Filed 7/10/19 P. v. Rios CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RIOS,

Defendant and Appellant.

F074387

(Super. Ct. No. BF163286A)

ORDER MODIFYING OPINION
[No Change in Judgment]

It is hereby ordered that the opinion filed herein on June 27, 2019, be modified as follows:

1. Delete the footnote indicator for footnote 4 on the last line of page 6;
2. Renumber the remaining footnotes so that existing footnote 5 becomes new footnote 4, existing footnote 6 becomes new footnote 5, etc.

Except for the modification set forth, the opinion previously filed remains unchanged.

This modification does not effect a change in the judgment.

_____
SMITH, J.

WE CONCUR:

_____
FRANSON, Acting P.J.

_____
SNAUFFER, J.

Filed 6/27/19 P. v. Rios CA5 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

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JOSE RIOS,

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(Super. Ct. No. BF163286A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Lauren E. Dodge, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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For a fairly straightforward, yet lengthy fact pattern, this appeal demands a very complex and tedious analysis into sufficiency, unanimity, and lesser related offenses. In addition, it provides an opportunity on remand for the trial court to look into Penal Code sections 1001.35 and 1001.36, and the potential application of mental health diversion. While we do not intend to steer the trial court in any particular direction as to how to exercise its discretion on mental health diversion, we do recommend the court conduct a review into whether it may be appropriate in this case.

Four Bakersfield firefighters were dispatched in a fire truck to check on defendant Jose Rios, who had been wandering in traffic, apparently intoxicated, and hitting a cement object with his bare fists. They approached and tried to speak with him, but he disregarded them and continued to behave erratically. Thinking him a danger to himself, they called for a peace officer to detain or arrest him. Chris Campbell, a Bakersfield Fire Department arson investigator, was the first to respond. Still oblivious, Rios walked past Campbell as Campbell ordered Rios to stop. Campbell observed the irrational behavior and associated it with PCP (phencyclidine or angel dust) use. He placed a hand on Rios and a scuffle ensued, during which Campbell, with the help of three firefighters, wrestled Rios to the ground and handcuffed him. Another arson investigator, Victor Mabry, arrived and took control of Rios as he continued to struggle. Mabry finally succeeded in carrying Rios, writhing and snapping his teeth, to a police car with the assistance of two police officers who had arrived in the mean time. Afterward, Campbell noticed his right hand hurt. An x-ray revealed a broken bone.

A jury found Rios guilty of a complex set of similar offenses based on this brief altercation, ranging from simple assault to assault on a peace officer with force likely to produce great bodily injury, enhanced with an allegation of personal infliction of great bodily injury. It also found him guilty of public intoxication. The court imposed a prison sentence the length of which—16 years—was owing largely to enhancements based on prior offenses.

A curious feature of the convictions involving Campbell was that in some of them, the jury necessarily found that Rios seriously injured Campbell, while in others, the verdict reached was possible only if Rios was *not* proved to have seriously injured Campbell. These verdicts are not inconsistent because there was evidence of multiple assaultive acts by Rios against Campbell and the jury could reasonably find that one or more of these caused injury and one or more of the others did not. The fact that this is what the jury appears to have done to reach these verdicts, however, highlights an error: Because the court did not give the jury a unanimity instruction and the prosecutor did not make elections, there is no assurance that for each conviction, all 12 jurors agreed on the same specific act or set of acts as proof of the necessary elements.

The potential for nonunanimity was exacerbated by the inconsistency in the way the charges were described to the jury. The inconsistencies pertained, for the most part, to the characterization of Campbell and Mabry as firefighters or peace officers. In the information, which was read to the jury at the beginning of the trial, Rios was accused of offenses that were aggravated because the victim was a firefighter. In the jury instructions, the jury was sometimes instructed that it must find the victim was a firefighter and sometimes a peace officer. The verdict forms, without consistency, refer to the victims as arson investigators, firefighters, and peace officers. It generally was impossible to discern from the combination of the information, jury instructions, and verdict forms which type of official was in question. Yet the jurors were required to make findings about whether Campbell and Mabry were officials of one type or another, which affected further necessary findings, regarding their official duties and whether Rios knew or reasonably should have known they were officials of a specific sort doing their official duty. This contributes to the impossibility we now face of stating with any assurance that the jurors based their verdicts on factual findings to which they all agreed.

Given the evidence and the complexity of the charges, the potential for disagreements was inevitable and the trial court should have given the jury a unanimity

instruction on its own motion. The failure to do so denied Rios the right to a unanimous jury. This is reversible error, affecting counts 1, 2, and 5, and the lesser included offenses under counts 3 and 4—all the charges in which Campbell was the victim.

On counts 5 and 6, the parties agree that the omission of an instruction on simple assault as an alternative to resisting an officer was erroneous. We agree, but not for the reason advanced by the parties. The People argue that the omission was harmless. We disagree. The only remaining conviction is count 8, public intoxication, which is unchallenged.

We reject Rios's claim that there was insufficient evidence to prove he knew or should have known Campbell and Mabry were peace officers. We have reviewed the materials reviewed in camera pursuant to Rios's *Pitchess*[1] motion, and find there was no discoverable evidence among those materials.

It is unnecessary to address Rios's remaining contentions, but we discuss some points concerning these for purposes of guidance on remand.

Finally, without issuing any sort of order or direction on a subject the parties have not raised, we deem it appropriate to call to the attention of the trial court and parties the new mental health diversion statute that became effective January 1, 2019. (Pen. Code,[2] §§ 1001.35-1001.36; Stats. 2018, ch. 34, § 24; Stats. 2018, ch. 1005, § 1.) There is no indication in the record that Rios has ever received a psychological evaluation, but there are indications that the actions for which he was convicted were products of mental disorder, including but possibly not limited to substance abuse disorder. Should the People undertake to prosecute again any of the charges on which we are reversing the convictions, the trial court will have discretion to bring the new statute into play.

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

2 Subsequent statutory references are to the Penal Code unless otherwise noted.

The reader will certainly find this opinion long and could well find the issues analyzed in it tedious, so it may be easy to lose sight of the central reality with which we are presented: A man found crazed and faltering in the street has been sentenced to 16 years in state prison—with at least 85 percent of that time actually to be served—because he had a long prior history of minor crimes[3] and because his frantic unreasoning struggle led to a broken bone in the hand of one of the emergency responders sent to corral him. The victim himself said Rios appeared not to be in his right mind.

The new mental health diversion statute presents an opening, depending upon availability of services, to treat this growing segment of the population in a manner different from, but certainly no worse than, the status quo.

The judgment is reversed except for count 8.

FACTS AND PROCEDURAL HISTORY

The district attorney filed an information charging Rios as shown in the table below. (The verdicts for each count are shown here as well for ease of reference.)

Count	Offense	Enhancement	Verdict
1	Assault on Campbell, a peace officer or firefighter, by means	Personal infliction of great bodily injury	Guilty Enhancement allegation

[3] There were dozens of these, as will be seen, all misdemeanors but three. One of the three felonies was a drug possession offense subsequently designated a misdemeanor under Proposition 47. The other two were making a criminal threat (§ 422) and being a misdemeanant in possession of a firearm (former § 12021, subd. (c)(1)). So far as the record discloses, there was some pretty frequent prior menacing and assaultive behavior, and this is bad, but the only time Rios has ever been involved in an incident in which someone got injured was this case, when Campbell hurt his hand in the process of forcing Rios to the ground.

Two of the offenses of which Rios was convicted in this case are classified as violent felonies on account of great bodily injury enhancements based on the hurt hand (§ 667.5, subd. (c)). The prosecutor at sentencing successfully argued against striking those enhancements by describing Rios as "a very dangerous individual" and "a danger to law enforcement."

	of force likely to produce great bodily injury (§ 245, subd. (c))	(§ 12022.7)	true
2	Assault on Campbell by means of force likely to produce great bodily injury (§ 245, subd. (a)(4))	Personal infliction of great bodily injury (§ 12022.7)	Guilty Enhancement allegation true
3	Battery on Campbell causing serious bodily injury (§ 243, subd. (d))		Not guilty of charged offense Guilty of lesser included misdemeanors: Assault (§ 240) Battery (§ 243, subd. (a))
4	Battery on Campbell, a firefighter, causing injury (§ 243, subd. (c)(1))	Personal infliction of great bodily injury (§ 12022.7)	Not guilty of charged offense Enhancement allegation not true Guilty of lesser included misdemeanors: Assault (§ 240) Battery (§ 243, subd. (a)) Assault on a peace officer (§ 241, subd. (c)) Resisting a peace officer (§ 148, subd. (a))[4]
5	Resisting Campbell, an executive officer—	Personal infliction of great bodily injury	Guilty

	felony (§ 69)	(§ 12022.7)	Enhancement allegation not true
6	Resisting Mabry, an executive officer—felony (§ 69)		Guilty
7	Resisting Campbell, a peace officer—misdemeanor (§ 148, subd. (a))		No verdict (jury instructed to skip if finding Rios guilty on count 5)
8	Public intoxication—misdemeanor (§ 647, subd. (f))		Guilty
9	Resisting Mabry, a peace officer—misdemeanor (§ 148)		No verdict (jury instructed to skip if finding Rios guilty on count 6)

Counts 1 through 6 were charged as second strikes (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), based on a 2015 conviction of making a criminal threat (§ 422). That conviction was alleged also as the basis for an enhancement under section 667, subdivision (a). Finally, the information alleged three prior felonies with prison terms (including the prior strike) for purposes of enhancements under section 667.5, subdivision (b).

At trial, Engineer Michael Bloomer, a firefighter with the Bakersfield City Fire Department, testified that on February 24, 2016, his engine, a large ladder truck, responded to a call for medical aid. He and three other firefighters were on board. They spotted Rios and parked the truck about 50 feet away from him. All four of them got out,

wearing their bright red medical aid jackets with "Bakersfield Fire Department" spelled out on the back, and proceeded down the sidewalk toward Rios.

When the firefighters approached him, Rios was bent over, picking "random items" up from the ground and putting them in a bag. He was "incoherent" and "not in control of his faculties," according to Bloomer. It had been reported that Rios had been punching concrete planters, and his hands were "really tore up." One of the firefighters tried to speak with him, but Rios ignored him. Then Rios walked around Bloomer and away from the group of firefighters. The firefighters followed. Rios walked erratically into the street and crossed it against the light. One car had to stop short to avoid him. Bloomer and the rest of his crew were concerned that Rios would get hit by a car, but they did not attempt to detain him physically because, as firefighters, this was not their role. In situations of this kind, they call for assistance, and typically it is the police department that responds. But sometimes the police are delayed and a fire department arson investigator might arrive and provide assistance in the mean time.

Arson investigators employed by fire departments are classified as firefighters by statute, but unlike other firefighters, and like police officers, they are also classified as peace officers and authorized to effect arrests under section 836 (i.e., peace officer arrests as opposed to citizen's arrests). (§§ 245.1, 830, 830.1, 830.37, subd. (a).)

Bloomer himself was unclear of the distinctions. At one point during his testimony, he said arson investigators sometimes respond to firefighters' calls for assistance because they are peace officers. At another point, when asked whether a peace officer responded on the day in question, he said no, an arson investigator did. Campbell, an arson investigator with the rank of captain in the Bakersfield Fire Department, was the first to respond.

On the day of the incident, Campbell had been an arson investigator for about eight months, according to his testimony. For nine years before that, he was a firefighter, and for the preceding 10 years he had been a police officer. He believed, incorrectly, that

under the statutory definition, he was a peace officer during his entire time with the fire department, not just when he became an arson investigator.

Campbell was working at Fire Station 1 when he heard a call go out on the radio for medical aid for a man, possibly under the influence, who had been punching a concrete planter box and walking in and out of traffic. A fire truck responded and subsequently called for police assistance. The man was at 17th Street and Chester Avenue, about two blocks away from police headquarters. Fire Station 1 was at 21st Street and H Street, about seven blocks from the man's location. Campbell drove to the scene in his unmarked fire department car. He was wearing his arson investigator uniform, consisting of a polo shirt with an embroidered fire department shield over the breast, utility pants, and a belt to which were attached a metal fire department badge, handcuffs, a gun, and an extra clip.

Arriving, Campbell saw Rios walking in the street at Truxtun and Chester. The firefighters were following Rios about 20 or 30 feet behind. Campbell pulled to the curb in front of Rios, got out, faced him, and loudly asked if he was okay. Rios kept walking and did not answer. He had scratches on his hands. His eyes were glazed and had what Campbell described as "a thousand-yard stare." Campbell believed Rios was "under the influence of something" and feared he was a danger to himself and to drivers who might have to try to avoid him. Later, when the encounter was over, Campbell believed the substance Rios had used was "quite possibly" PCP. People using PCP, in his experience, typically appeared not to be "in their right mind, meaning that they don't see you or don't react to … your commands." Further, their perception of pain is numbed, with the result that they have "a type of, like, Hulk-like strength, in that the muscles don't know when to stop because they don't feel any pain." Campbell also thought the substance Rios had used could have been "spice," a street drug made with synthetic cannabinoids.

Rios walked past Campbell. Campbell turned and shouted "stop" at Rios's back. He did not announce that he was a law enforcement officer at this point or any other point

during the incident. Rios did not stop. Campbell decided to restrain him. He wanted to stop Rios from walking so he could talk to him. He walked up behind Rios and grasped his upper left arm.

Rios turned, faced Campbell, and "threw his hands up in the air," causing Campbell to lose his grip on Rios's arm. Rios took "what we call a combative stance, which means a stance like he was ready to fight." Campbell testified that he had seen people take up that posture many times in the past. When asked "[w]hat typically happens after somebody takes that stance," Campbell replied, "We fight."

Campbell made the next move. "I placed him in … an arm bar control hold," he testified, agreeing that this hold forces people to submit because their arm could be broken otherwise. By this time, Campbell had come to view the encounter as an arrest. Rios struggled to get away and Campbell forced him to the ground. Rios hit Campbell with his hands and tried to bite him. Campbell wrestled Rios onto his stomach and put his left hand in a handcuff. Rios kept his right hand underneath him and tried to buck Campbell off his back. Campbell found that Rios was very strong and difficult to subdue; this was consistent with Campbell's hypothesis that Rios had used PCP. Three of the firefighters on the scene came and helped hold Rios down using their body weight. Then Campbell was able to put the other handcuff on Rios. (Bloomer testified that he believed it probably was Mabry, the other arson investigator, who got the second handcuff on.) Campbell's entire interaction with Rios lasted from one and half to two minutes.

After the handcuffs were on Rios, Campbell noticed that his right hand hurt. He believed he injured it when he forced Rios to the ground. Bloomer later examined it and found it was swollen and distended. At a hospital later that day it was determined that one of the bones in his right hand, the fourth metacarpal, was broken. He wore a cast that went partway up his arm for eight weeks and had to be on light duty.

Bloomer also described the altercation in his trial testimony. Even with Campbell and the four firefighters holding him down, and with Campbell telling him to stop resisting, Rios struggled hard to get up. Bloomer found Rios's strength surprising. When at least one handcuff was on Rios, Mabry arrived and took over for Campbell.

Mabry had been an arson investigator for seven years. He testified that he also responded to the radio call for the incident, leaving the fire station at the same time as Campbell, wearing the same arson investigator uniform. Mabry arrived at the scene later than Campbell because he drove more slowly. "This was not a Code 3 response in my mind, meaning lights and sirens," he stated. "It required a Code 2 response, meaning I respond without lights and sirens, but I obey all traffic signals en route." When he arrived, he saw Campbell lying on top of Rios, who was handcuffed, and the three firefighters helping to hold Rios down. Rios was still struggling, trying to get up. Mabry agreed with the assessment of Campbell and Bloomer that Rios was unusually difficult to control and this could be an effect of drug use. Campbell told Mabry he thought he broke his hand and Mabry took over for him. Rios, still thrashing about as he lay on his stomach with his hands cuffed behind his back, turned his head and tried to bite Mabry over his shoulder. At about this time, two uniformed police officers arrived in two marked patrol cars, and they helped Mabry move Rios to one of the cars. As this was happening, Rios continued struggling energetically and trying to bite his captors. Seven to 10 minutes after Mabry's arrival, he and the police officers succeeded in placing Rios inside the car. Mabry agreed with Campbell's assessment that Rios needed to be taken into custody because he was a danger to himself and others.

One of the police officers testified at trial. He said Rios continued struggling as he, the other police officer, and Mabry carried him to the police car. The defense did not call any witnesses.

As indicated in the table above, the jury returned a complex set of verdicts. Counts 1 through 5 specified Campbell as the victim. Count 1 charged assault on a

firefighter by means of force likely to produce great bodily injury (§ 245, subd. (c)) and count 2 charged assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). The jury found Rios guilty on both of these counts as charged, and found true the enhancement allegations on both that he personally inflicted great bodily injury on Campbell (§ 12022.7). On counts 3 and 4, by contrast, the jury found Rios not guilty of the charged offenses of battery causing serious bodily injury (§ 243, subd. (d)) and battery on a firefighter causing injury (§ 243, subd. (c)(1)). Instead, it found him guilty of lesser included misdemeanor offenses that omitted the injury element: assault (§ 240) and battery (§ 243, subd. (a)) on both counts, plus assault on a peace officer or firefighter (§ 241, subd. (c)) and resisting a public officer (§ 148, subd. (a)(1)) on count 4. Also on count 4, the jury found not true an enhancement allegation of personal infliction of great bodily injury. On count 5, the jury found Rios guilty of the offense of resisting an executive officer (§ 69), charged as a felony, but found not true an enhancement allegation of personal infliction of great bodily injury.

The jury also returned guilty verdicts on count 6, felony resisting of Mabry, an executive officer (§ 69), and count 8, misdemeanor public intoxication (§ 647, subd. (f)). It was instructed not to return verdicts on counts 7 and 9 if it found Rios guilty on counts 5 and 6.

As mentioned, the verdicts on counts 1 and 2, along with their enhancements, both included findings that Rios personally inflicted great bodily injury on Campbell. The verdicts on counts 3, 4, and 5 were based on contrary findings. On count 3, the jury found Rios not guilty of the charged offense, battery causing serious bodily injury, but guilty of the lesser included offenses of simple assault and simple battery. The only difference in elements between battery causing serious bodily injury and simple battery is that the former requires proof that the victim was seriously injured as a result of the battery and the latter does not. The jury's conclusion can only mean it found serious injury to Campbell was not proved. On count 4, the jury found Rios not guilty of the

charged offense of battery on a firefighter resulting in injury to the victim, and found an enhancement allegation of personally inflicting great bodily injury not true. But it found him guilty of lesser included offenses of simple assault, simple battery, simple battery on a peace officer, and resisting a peace officer. Again, the only logical reason the jury could have had for rejecting the charged offense and the enhancement but finding all these lesser offenses proved is that it found proof of injury or great bodily injury to Campbell was lacking. On count 5, resisting an executive officer, the jury found Rios guilty but found not true an enhancement allegation that he had personally inflicted great bodily injury on Campbell.

The defense made a motion for a new trial or modification of the verdict, arguing, among other things, that the verdict as a whole was inconsistent or contrary to the law or the evidence. The court rejected this argument. "[I]t is a curious verdict, no doubt," the court stated, but there was no inconsistency because "[t]here were multiple acts that the jury could rely upon to reach the verdict that they reached." In other words, the jury could have relied on injury-causing acts in reaching its verdicts on counts 1 and 2, and on other, non-injury-causing acts in reaching its verdicts on counts 3, 4, and 5. The motion was denied.

The court conducted a bench trial on the prior offense allegations. It found that Rios had previously been convicted of: (1) making criminal threats (§ 422) in case No. BF156110A; (2) being a misdemeanant in possession of a firearm (former § 12021, subd. (c)(1)) in case No. BF120948A; and (3) possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) in case No. BF139744A. The first of these was found true for purposes of the second-strike enhancement as well as the enhancement under section 667, subdivision (a). All three convictions were found true for purposes of the enhancements under section 667.5, subdivision (b).

The court denied Rios's motion under section 1385 to strike the prior strike allegation. "[T]his is not an easy decision for me," the court said, presumably because a

long prison term, like the term of 21 years four months recommended by the probation officer, might seem severe for an incident beginning with a call for medical aid and leading only to the thrashings of a man acknowledged not to be in his right mind, plus an arson investigator's broken metacarpal. After hearing argument, the court said it "really struggled," but it concluded that Rios fell within the spirit of the three strikes law because his prior strike conviction was recent (2015) and his criminal history was long.

As shown in the probation report, Rios's criminal history included one juvenile adjudication in 2000, adult convictions of 37 offenses between 2004 and 2016 (three felonies and 34 misdemeanors) in 24 cases, and numerous violations of probation and parole. The three felonies were the same prior felonies the court found proved for enhancement purposes in the present case: (1) former section 12021, subdivision (c)(1), being a misdemeanant in possession of a firearm, conviction date February 21, 2008; (2) former Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, conviction date February 8, 2012, reduced to a misdemeanor pursuant to section 1170.18 (Prop. 47) on April 22, 2016; and (3) section 422, making a criminal threat, conviction date May 28, 2015. The misdemeanors included assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), making a criminal threat (§ 422), driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), vandalism (§ 594, subd. (b)(2)(a)), battery (§ 243, subd. (a)), resisting a public officer (§ 148, subd. (a)(1)), trespassing (§ 602, subd. (m)), being under the influence of a controlled substance (§ 11550, subd. (a)), drawing or exhibiting a deadly weapon other than a firearm (§ 417, subd. (a)(1)), attempting to deter or prevent an executive officer (§ 69), and multiple violations of protective orders (§ 273.6).

The court sentenced Rios to a prison term of 16 years, calculated as follows. Count 1: the lower term of three years, doubled to six for the prior strike, plus three years for the great bodily injury enhancement, plus five years for the section 667, subdivision (a) enhancement, plus two years for two section 667.5, subdivision (b) enhancements, for

a total of 16 years. Count 2: the lower term of two years, doubled to four for the prior strike, plus three years for the great bodily injury enhancement, all stayed pursuant to section 654. Counts 3 and 4, six lesser offenses: six county jail terms of 180 days, all concurrent and stayed pursuant to section 654. Count 5: the lower term of 16 months, doubled to 32 months for the prior strike, and stayed pursuant to section 654. Count 6: the lower term of 16 months doubled to 32 months, concurrent. Count 8: 180 days county jail, concurrent.

DISCUSSION

I. Sufficiency of evidence that Rios knew Campbell was a peace officer or firefighter doing his duty

Count 1 charged Rios with a violation of section 245, subdivision (c), one element of which is that the defendant "knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties" at the time of the assault. Rios argues that the evidence at trial was insufficient to prove this element.

As will be seen later in this opinion, inconsistent language in the information, jury instructions, and verdict forms muddled the issue of which type of official—a firefighter or a peace officer—the jury had to make findings about on this and other counts. For purposes of the sufficiency-of-evidence analysis, we will cover both.[5]

When considering a challenge to the sufficiency of the evidence to support a judgment, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary findings beyond a reasonable doubt. The evidence must be

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[5] Campbell and Mabry were, in fact, both. As fire department officers, employees or members, they were firefighters. (§ 245.1.) As members of an arson-investigating unit employed by a fire department, and having as their primary duties the detection and apprehension of persons who have violated a fire law or committed insurance fraud, they were peace officers. (§ 830.37, subd. (a).) These facts are not in dispute on appeal.

reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

First, there was substantial evidence on the basis of which a reasonable fact finder could find that Rios knew or reasonably should have known that Campbell and Mabry *were firefighters*. They arrived shortly after four other firefighters in bright-red fire department jackets pulled up near Rios in a fire engine and tried to get his attention. Campbell and Mabry were dressed in clothing that displayed their affiliation with the fire department. Before the altercation began, Rios was confronted with Campbell at close quarters and had an opportunity to see what was on his shirt. Rios points out that it was a brief opportunity, but a reasonable jury could find it was enough, or that a reasonable person would have paused before striking a fighting pose. Later, when Mabry arrived, it would have been obvious that he and Campbell were dressed the same way. Rios's intoxication could be grounds for finding he did not actually know; but a reasonable juror could conclude that a reasonable person would have observed all these things and understood that Campbell and Mabry were with the fire department.

There also was substantial evidence on the basis of which a reasonable fact finder could find that Rios knew or reasonably should have known that Campbell and Mabry *were doing their official duty as firefighters* when the altercation took place. Unless they fall into an additional category (see § 830.37, subds. (a)-(b)), fire department employees do not have the authority of peace officers to make arrests. We will assume the duties of a firefighter do not include making *citizen's* arrests. But Campbell, Mabry and Bloomer all testified that they had a general duty to protect public safety. A reasonable fact finder could find that a reasonable person would be aware that firefighters have some such general duty, and would suppose that preventing an intoxicated person from continuing to

wander in a busy street falls within that duty. A reasonable person also would consider that if an intoxicated person became belligerent under these circumstances, the task of moving the intoxicated person out of the street by force might fall to the firefighter.

Next, there was substantial evidence on the basis of which a reasonable fact finder could find that Rios knew or reasonably should have known that Campbell and Mabry *were peace officers*. Having no more than common knowledge and experience on the subject, a reasonable person would grasp that a peace officer is an official authorized to enforce the law and make arrests. A reasonable person also would be aware that such officials are sometimes seen in public without full police uniforms on, but that they can still often be identified by accessories generally associated with law enforcement: a badge, a gun, and handcuffs. A reasonable person in Rios's position would have noticed these items as parts of Campbell's and Mabry's outfits—or so a reasonable fact finder could find.

Finally, the jury could reasonably conclude that, having the above understanding of peace officers' authority, a reasonable person in Rios's position would be aware that standing in the middle of a busy street while intoxicated is unlawful and dangerous, and that a peace officer's duty would be to do something about it, including seizing and arresting him by force if he did not move to a safe place willingly. A reasonable factfinder could thus conclude that Rios knew or reasonably should have known that Campbell and Mabry *were doing their official duty as peace officers* at the time of the incident.

Rios maintains that he could not reasonably be expected to know Campbell and Mabry were peace officers because the relevant statutory definitions are complex and their details are unknown to most people; even Campbell and Bloomer made misstatements on the subject in their testimony. Rios cites *People v. Pennington* (2017) 3 Cal.5th 786, 792-793, in which our Supreme Court pointed out that "[c]hapter 4.5 [of title 3 of part 2 of the Penal Code] contains over 100 sections and subdivisions authorizing

public agencies to confer the status and powers of a peace officer on the members of a host of state and local personnel categories, subject to an intricate array of conditions and limitations." There is no reason, Rios argues, why he would have known that Campbell and Mabry were arson investigators; no reason why he would have known the statutorily designated conditions under which an arson investigator is a peace officer[6]; no reason why he would have known whether Campbell and Mabry satisfied these conditions; no reason why he would have known the scope of their authority to act as peace officers[7]; and no reason why he would be able to judge, on the spot, whether their actions fell within that scope. The situation as a whole, before the fighting began—the fire truck on the scene, the firefighters in their red jackets trying to talk to Rios, Campbell in his arson investigator gear trying to talk to Rios, the brief time during which Rios was looking directly at Campbell—could not possibly have conveyed all this information.

Rios is obviously correct that a reasonable person in his position would not necessarily have known all these technical details. But we do not think knowledge in the relevant sense involves mastery of the pertinent provisions of the Penal Code. The assault statute at issue, section 245, subdivision (c), plainly is not intended to limit liability to people with this specialized knowledge. The statute is intended to deter and punish assaults on peace officers and firefighters by members of the general public, but it cannot do this if a finding of guilt requires the defendant to have technical background information the general public does not possess. For the statute to function, it has to be enough if the defendant has, or a reasonable person in the defendant's position would

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6 "[R]egularly paid and employed in that capacity," if his or her "primary duty . . . is the detection and apprehension of persons who have violated any fire law or committed insurance fraud." (§ 830.37, subd. (a).)

7 When "performing their primary duty" or making an arrest "as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense." (§ 830.37).

have, a *belief based on common experience* that the victim is a peace officer doing his or her duty.

The argument could be made that a belief of this description would not be *knowledge*. A badge, gun, handcuffs, an official-looking shirt, and the surrounding circumstances—these things might trigger a reasonable person's belief that he or she is confronted with a peace officer, but they hardly constitute a list of criteria that *make* someone a peace officer. A belief founded in this way would be unjustified—even if it was correct—because it would be connected only in an attenuated way with the considerations that actually determine who is a peace officer: the rules laid down by the Legislature and the facts regarding the individual's appointment and job description.

But the logical end point of this line of reasoning shows that it is untenable. A reasonable person at a crime scene would have to be said not to "know" that a person wearing a standard police uniform, fully equipped with badge, gun, ammunition, handcuffs, radio, and body camera, emerging from a black and white police car with its roof-mounted emergency lights flashing, is a peace officer. None of those things are parts of the statutory definition of a peace officer, after all.

So the real question must be simply whether, on the evidence available to the defendant at the time, a reasonable person of ordinary experience would have been able to conclude with a reasonable degree of certainty that the person in question was a peace officer doing his or her official duty. In light of the totality of the circumstances in which Rios confronted Campbell and Mabry, their badges, guns, handcuffs, ammunition, and uniform shirts were enough evidence for this.

People v. Morris (2010) 185 Cal.App.4th 1147 is an example of the absurd consequences that can follow from interpreting a knowledge element in a criminal statute as if it required the defendant's application of highly technical background information about the law or other specialized subjects. In *Morris*, the Court of Appeal reversed the jury's true finding on a special allegation that the victim of a robbery was

developmentally disabled and the defendant knew or should have known this. In the court's view, "there had to be evidence from which the jury reasonably could have found that [the] defendant knew [the victim] was mentally impaired and knew that, as a result, she had a severe, chronic disability that was likely to continue indefinitely and that resulted in her being substantially functionally limited in three or more of the specific areas of life activity identified in the statute (self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency)." (*Id.* at p. 1154.) Presiding Justice Scotland, dissenting on this point, got it right: "[T]he majority's test will effectively mean that, unless the evidence establishes that a defendant is a mental health expert, a jury never could find a defendant knew or had reason to know that a victim was developmentally disabled." (*Id*. at p. 1158 (conc. & diss. opn. of Scotland, P.J.).)

For all these reasons, we disagree with Rios's contention that the evidence was not sufficient to support the conviction on count 1.

It is important to remember that in deciding a claim of insufficient evidence, we go no further than determining what a reasonable factfinder *could* reasonably find, not what such a factfinder must find. We have not determined that a reasonable factfinder could not find the contrary instead. This will be significant in the discussion that follows about omitted jury instructions.

II. Jury instruction issues

Rios claims there were several prejudicial instructional errors: (1) the court should have given a unanimity instruction on its own motion for counts 1, 2, 3, and 4; (2) there were missing lesser offense instructions on counts 5 and 6; (3) the court erroneously refused to give a general self-defense instruction; and (4) a voluntary intoxication instruction should have been given on count 1.

We agree with the first contention. Because the prosecutor never made any election, the jury was left free to mix and match Rios's various assaultive actions with the

numerous discrete but subtly different counts involving Campbell, without ever agreeing on which acts constituted which crimes. Also, inconsistencies in the official materials presented to the jury—the information, the jury instructions, and the verdict forms—obscured the matter of what sort of officials the jurors found Campbell and Mabry to be, as well as the matter of what facts Rios reasonably should have known about them. Under these circumstances, the trial court was required to give a unanimity instruction on its own motion. The People's contention that all Rios's actions constituted one continuous course of conduct underlying all those convictions is untenable: The jurors could, and did, reach verdicts that would be inconsistent unless they found multiple discrete acts, some proved to have caused great bodily injury and others not proved to have done so.

The error affected (at least) all the counts in which Campbell was the victim. Rios's opening brief applies his argument on this issue only to the convictions under counts 1, 2, 3, and 4, but it applies equally to count 5.

As to the second contention, we agree that the jury should have been instructed on simple assault (§ 240) on counts 5 and 6. This is not because it was a lesser included offense for which the trial court was required to give instructions on its own motion, as the parties suppose. Instead, it was a lesser related offense, and defense counsel should have asked the prosecutor to agree to a stipulation that the instruction would be given. By not making this request of the prosecutor, counsel was professionally unreasonable as there was a reasonable probability that Rios would have received better verdicts on counts 5 and 6. Those counts thus must be reversed due to a denial of Rios's right to effective counsel.

All the convictions except count 8, public intoxication, must be reversed on account of these errors.

A. Substantive standards and standard of review for jury instructions

In a criminal trial, with or without requests by the parties, the court must instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) It must give an instruction requested by a party if the instruction correctly states the law and relates to a material question upon which there is evidence substantial enough to merit consideration by the jury. (*People v. Avena* (1996) 13 Cal.4th 394, 424; *People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 201.) The court need not give an instruction if it is repetitive of another instruction the court gives. (*Michaels, supra,* 28 Cal.4th at pp. 529-530.) When the giving or omission of a jury instruction is challenged on appeal, it is to be considered not in isolation, but in the context of the trial court's entire charge. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

A challenge to the jury instructions raises a mixed question of law and fact that is predominantly legal, and we review it under the de novo standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

A claim of instructional error can be forfeited by a defendant's failure to make some suitable form of objection at trial, except, of course, in the case of instructions the court is required to give on its own motion. Under section 1259, an appellate court can review, without objection having been made at trial, the giving, refusal, or modification of any jury instruction. More generally, an appellate court has discretion to review an issue despite an appellant's forfeiture of it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

If we determine that the trial court's instructions to the jury contain an error of state law only, we reverse the judgment only if there is a reasonable probability that the defendant would have obtained a more favorable outcome absent the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*); *People v. Watson* (1956) 46 Cal.2d

818.) In case of an error of federal constitutional law, we generally reverse unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Lamas* (2007) 42 Cal.4th 516, 526; *People v. Mayfield* (1997) 14 Cal.4th 668, 774, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2; *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).)

B. The information, jury instructions, and verdict forms

As indicated above (and as will be explained in part II.C. below), a lack of consistency in the way most of the charges were presented to the jury, via the information, the jury instructions, and the verdict forms, contributed to prejudice arising from the most significant error in this case, the failure to require unanimous findings on all counts. To illustrate the problem, it is unfortunately necessary to describe the rather convoluted details. We include this description here not because our disposition of the case relies on these anomalies as reversible errors in themselves, but because the confusion to which they give rise is relevant to the issue of the prejudice caused by the court's failure to give the jury a unanimity instruction.

Count 1

On count 1, the jury found Rios guilty violating section 245, subdivision (c), with Campbell as the victim. It was one of the two counts on which the jury found that Rios personally inflicted great bodily injury on Campbell (§ 12022.7).

Section 245, subdivision (c), provides for the punishment of any person who commits an assault by means of force likely to produce great bodily injury on the person of "a peace officer or firefighter" engaged in the performance of his or her duties, provided that the person "knows or reasonably should know" that the victim is a peace officer or firefighter engaged in the performance of his or her duties.

As read to the jury, count 1 of the information charged Rios with violating a version of section 245, subdivision (c), that was somewhat garbled and referred to a firefighter but not a peace officer. It stated that Rios committed an assault on "the person

of Bakersfield Fire Department Campbell, by means of force likely to produce great bodily injury, in violation of Penal Code section 243(d) when [Rios] knew or should have known that said person was a firefighter then and there engaged in the performance of his or her duties, in violation of Penal Code Section 245(c), a felony." Section 245, subdivision (c), in reality does not contain any reference to section 243, subdivision (d) (battery inflicting serious bodily injury).

The jury was instructed in accordance with CALCRIM No. 860. The written instruction that was provided to the jurors included the title of the Judicial Council form setting forth the pattern instruction, "ASSAULT ON FIREFIGHTER OR PEACE OFFICER WITH DEADLY WEAPON OR FORCE LIKELY TO PRODUCE GREAT BODILY INJURY." The text of the instruction first referred to the crime as "assault with force likely to produce great bodily injury" without mentioning a firefighter or peace officer. Then, in the numbered elements of the crime, the jury was instructed that the prosecution had to prove the person assaulted was "lawfully performing his duties as a peace officer" and that Rios knew or reasonably should have known the person assaulted "was a peace officer who was performing his duties." The set of definitions at the end of the instruction stated that "[a] person who is employed as an Arson Investigator is a peace officer," and that "[a] firefighter includes anyone who is an officer, employee, or member of a (governmentally operated fire department in this state, whether or not he or she is paid for his or her services)."

The verdict form for this offense asked the jury to find Rios guilty or not guilty of "Assault on a Peace Officer Engaged in Performing His Duties with force likely to cause Great Bodily Injury, in violation of section 245(c) of the Penal Code, as charged in the first count of the Information."

To summarize: The information charged Rios in count 1 with assaulting a firefighter, not a peace officer. The jury instructions strongly suggested that the jury could find Rios guilty on count 1 as charged if it found he was either a peace officer or a

firefighter doing his duty and Rios knew or should have known this; and this understanding would have been consistent with the statute. The numbered elements stating what the jury had to find referred only to a peace officer, but the references to a firefighter before and after the numbered elements left the jury to infer that it could make findings with respect to either and it did not matter which, or simply that firefighters are peace officers and have the same duties. The verdict form referred only to a peace officer, but did nothing to mitigate the confusion, as it was the ambiguous instructions that were meant to tell the jury how to reach the verdict it would enter on the verdict form.

Count 2

On count 2, the jury found Rios guilty of violating section 245, subdivision (a)(4). This was the other count on which the jury found that Rios personally inflicted great bodily injury on Campbell (§ 12022.7). Section 245, subdivision (a)(4), provides for the punishment of a person who assaults any other person by means of force likely to produce great bodily injury. The information, jury instruction, and verdict form were all in agreement that no finding that Campbell belonged to any particular class of person was required or made.

Count 3

On count 3, the jury found Rios not guilty of violating section 243, subdivision (d), battery on Campbell causing serious bodily injury, but guilty of two misdemeanors, simple assault (§ 240) and simple battery (§ 243, subd. (a)). Again, there is no question, in the information, the jury instructions, or the verdict forms, of any finding that Rios knew or should have known Campbell was a peace officer or any other particular kind of person. Because the only difference between the charged offense and simple battery is that the charged offense had a serious bodily injury element, this is one of the counts on which the jury must have found Campbell was not seriously injured.

Count 4

On count 4, the jury found Rios not guilty of violating section 243, subdivision (c)(1), battery on a firefighter causing injury, the victim being Campbell. It found Rios guilty of four lesser included offenses. The jury found not true the allegation that Rios personally inflicted great bodily injury on Campbell (§12022.7).

Section 243, subdivision (c)(1), requires findings that the victim is a custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, animal control officer, or nonsworn employee of a probation department engaged in performing his or her duty, or a physician or nurse rendering emergency medical care outside a facility, and that the defendant knew or reasonably should have known this. There is no reference to a peace officer in this statute. In the information, count 4 referred only to a firefighter. The jury instructions on this offense also referred only to a firefighter.

The jury found Rios guilty of simple assault (§ 240) and simple battery (§ 243, subd. (a)). Again, these convictions involved no finding that Campbell was a firefighter or any other kind of official.

The jury found Rios guilty of a violation of section 241, subdivision (c). That statute provides for the punishment of a person who assaults a peace officer, firefighter, emergency medical technician, or any of several other kinds of officials, where the person knows or should know the victim is such an official doing his or her duty. The jury instructions stated that to find Rios guilty of this offense, the jury had to find Rios knew or should have known Campbell was a firefighter doing his duty. The verdict form, however, referred to the offense as simple assault on a peace officer. It is thus impossible to determine whether this conviction represents the jury's finding that Rios knew or should have known Campbell was, and was doing the duty of, a firefighter, a peace officer, or both.

The jury found Rios guilty of a violation of section 148, subdivision (a). That statute states that a person who willfully resists "any public officer, peace officer, or an emergency medical technician" is guilty of a misdemeanor. As given by the trial court, the pattern jury instruction for the offense, CALCRIM No. 2656, covered this misdemeanor as a lesser included offense under count 4; it also covered counts 7 and 9, which were presented to the jury as lesser included offenses under counts 5 and 6. The instruction stated that the prosecution was required to prove Campbell was a peace officer lawfully performing his duty and Rios knew or reasonably should have known this. It stated that an arson investigator is a peace officer, and explained that a peace officer is not lawfully performing his duty if making an unlawful arrest or detention or using unreasonable or excessive force.

Curiously, unlike any other jury instruction given in this case, the instruction for section 148 included a unanimity requirement: "The People allege that the defendant resisted or obstructed or delayed Christopher Campbell/Victor Mabry by doing the following: failing to stop and/or comply with the directions of the officer and/or sit down and/or stop struggling and/or go safely into the police vehicle. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of resisting[,]/ [or] obstructing[,]/ [or] delaying a peace officer who was lawfully performing his or her duties, and you all agree on which act he committed."

The verdict form for this offense stated that Rios was guilty of "Resisting Arrest," and did not refer to a peace officer, firefighter, or any other official.

With the information referring to a firefighter in count 4, the jury instructions on the section 148 lesser included offense referring to a peace officer, and the verdict form referring to neither, it is uncertain what the jury found Rios knew or reasonably should have known about Campbell.

Counts 5 and 6

The jury found Rios guilty of violating section 69 with Campbell as the victim on count 5 and with Mabry as the victim on count 6. On count 5, the jury found not true an allegation that Rios personally inflicted great bodily injury on Campbell.

Section 69 prescribes punishment for any person who either "attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law," or "knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty."

The information referred to both of these ways of committing the offense: the "attempts by means of any threat or violence" way, and the "knowingly resists, by the use of force or violence" way. It referred to them disjunctively—Rios is guilty if he did either—as the statute itself does. The information referred to the victims as "Bakersfield Fire Department Campbell" and "Bakersfield Fire Department Mabry" and said they were executive officers.

Focusing exclusively on the second of these two ways of committing the offense, the jury instructions for counts 5 and 6, stated in accordance with CALCRIM No. 2652, that the prosecution must prove Rios "unlawfully used force or violence to resist an executive officer" who was "performing his lawful duty" at the time, and that Rios "knew the executive officer was performing his duty." Because of the inclusion of the word "knowingly" in the relevant clause of section 69, Rios's actual knowledge that Campbell and Mabry were executive officers doing their duty was required. It would not have been enough if he merely should have known.

The instruction included a definition of an executive officer: "An executive officer is a government official who may use his or her own discretion in performing his or her job duties." It added: "A peace officer is an executive officer."

The instruction did not state that some executive officers, such as firefighters, are not, or usually are not, peace officers. It also omitted bracketed portions of the pattern

instruction that would, with the blanks appropriately filled in, have given the jury information relevant to Campbell and Mabry's status as peace officers. These portions would have explained the conditions under which an arson investigator is a peace officer. Further, they would have informed the jury that an official of this description is authorized to make arrests as a peace officer, but only for limited purposes: performing his or her primary duties related to fire laws and insurance fraud, arresting a person for a public offense that poses an immediate danger to persons or property, or preventing the escape of a person who has committed such an offense. (See CALCRIM No. 2652; § 830.37, subd. (a).)

The instruction on counts 5 and 6 made the point that the lawful duty element of section 69 is not proven if the defendant was resisting the officer's excessive force or an unlawful arrest: "A peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties. Instruction 2670 explains when an arrest or detention is unlawful and when force is unreasonable or excessive."

After the jury was told that the information charged Rios in these counts with resisting an executive officer, and the jury instructions stated that (a) the prosecution must prove Campbell and Mabry were executive officers, and (b) a peace officer is an executive officer, the verdict forms made a leap: They required the jury to find Rios guilty or not guilty (in Campbell's case) of "Obstructing/Resisting Christopher Campbell, a Peace Officer from Performing His Duties, in violation of Section 69 of the Penal Code, as charged in the fifth count of the Information." (The form for count 6 said the same for Mabry.) Yet the information did not charge Rios with resisting a peace officer on these counts; the jury instructions for these counts did not state that the prosecution must prove Campbell and Mabry were peace officers; and resisting a peace officer specifically is not what section 69 proscribes. The combined effect was to induce the jury to declare that the officials Rios resisted were peace officers doing their duty and he knew it, even

though the statute, the information, and the jury instructions called for no such determination.

The court instructed the jury on section 148, subdivision (a), as a lesser offense included in section 69, but this was error. Section 148, subdivision (a), is not a lesser included offense of section 69 under the elements test,[8] because it is possible to violate the "attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law" part of section 69 without violating section 148, subdivision (a). Unlike section 69, section 148, subdivision (a), requires a completed act of resisting, obstructing, or delaying, and cannot be violated by a mere attempt. Section 148, subdivision (a), also requires the officer to be performing or attempting to perform his or her duties at the time of the resisting, while the "attempts" portion of section 69 can be violated by a threat to interfere with the officer's duties in the future.

Section 148, subdivision (a), also was not a lesser included offense of section 69 under the accusatory pleading test in this case, because the information referred to both parts of section 69, not just the "knowingly resists, by the use of force or violence" part, and did so *disjunctively*. Rios could have violated section 69 as charged in the information by violating the "attempts" portion alone, without violating section 148, subdivision (a). (Compare *People v. Smith* (2013) 57 Cal.4th 232, 240-243 (*Smith*) [§ 148, subd. (a) was a lesser included offense of § 69 under the accusatory pleading test where the information charged the defendant with violating *both* parts of § 69, stated *conjunctively*, which he could not do without also violating § 148, subd. (a)]; *People v.*

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8 California courts have employed two tests, the elements test and the accusatory pleading test, to identify lesser necessarily included offenses. "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

Brown (2016) 245 Cal.App.4th 140, 153 (*Brown*) [same analysis applied to §§ 69 and 240]).)

CALCRIM No. 2670

The court instructed the jury in accordance with CALCRIM No. 2670. As given, the instruction stated that it pertained to counts 1, 5, 6, 7, and 9. It explained that the prosecution was required to prove that Campbell and Mabry were lawfully performing their duty as peace officers; and they were not lawfully performing their duty if they were using unreasonable or excessive force or otherwise carrying out an unlawful detention or arrest.

According to the instruction, a peace officer makes a lawful detention if he or she is aware of facts that reasonably lead him or her to suspect the arrestee has been, is, or is about to be involved in crime; and such an officer makes a lawful arrest if there is probable cause to make it. For a warrantless misdemeanor arrest, the officer also needs probable cause to believe the arrestee committed the offense in the officer's presence. The instruction stated that "any other" detention or arrest is unlawful.

The instruction did not explain the conditions under which a person who is not a peace officer, such as a firefighter who is not an arson investigator, can make a lawful arrest—i.e., a citizen's arrest. And it did not explain that an arson investigator's authority to make arrests as a peace officer is less extensive than that of some other peace officers, such as police officers. As noted above, an arson investigator who is a peace officer is authorized to make arrests *as* a peace officer (and not just a citizen) only for the purposes of performing his or her primary duties of detecting and apprehending those who violate fire laws or commit insurance fraud, arresting a person for a public offense that poses an immediate danger to persons or property, or preventing the escape of a person who has committed such an offense. (§ 830.37, subd. (a).) A police officer, by contrast, is authorized to make an arrest as a peace officer for *any* public offense committed within the police department's jurisdiction. (§ 830.1, subd. (a)(1).) These omitted distinctions

were relevant to the jury's deliberations about what type of officials Campbell and Mabry were, whether they were doing their duty, and what Rios knew or reasonably should have known about those matters.

The instruction stated that if the arrestee knows or reasonably should know that he or she is being arrested or detained by a peace officer, the arrestee has a duty not to resist, unless the officer uses unreasonable or excessive force. If the officer uses unreasonable or excessive force, the arrestee may lawfully use reasonable force in self-defense. If the arrest is unlawful for any other reason, the defendant still has a duty not to resist, but can be convicted only of assault or battery, rather than an offense that requires the officer to have been doing his or her lawful duty. The instruction did not explain what the arrestee's duty is if he or she reasonably believes the arresting person is not a peace officer.

As given by the court, CALCRIM No. 2670 did not refer to count 4 or its lesser included offenses. To the extent that those charges were intended to lead to convictions for battering, assaulting, or resisting a peace officer, it should have referred to them.

C. Unanimity instruction

Rios argues that the trial court erred by not instructing the jurors that to convict Rios on the offenses charged in counts 1, 2, 3, and 4 (all of which charged assaultive behavior against Campbell) or lesser offenses included in those counts, they must agree unanimously about which of Rios's acts formed the basis of each conviction. As there was no election by the prosecutor, the court should have given the unanimity instruction on its own motion. We agree. The same reasoning applies to count 5, charging a violation of section 69. This count also had Campbell as the victim, and required assaultive behavior (force or violence) under the instructions the jury received.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the

information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) The purpose of this rule is to eliminate the risk that a jury may return a guilty verdict even though the jurors are not all agreed on the existence of a single set of facts constituting the offense. Without an election or a unanimity instruction under these conditions, jurors would be in danger of either (a) amalgamating evidence of several separate instances of conduct, each only amounting to partial proof of an offense, and treating the amalgamation as proof of one complete offense, or (b) dividing on the sufficiency of the proof of two or more offenses, with some jurors voting for conviction based on their belief that one set of acts constituted a complete offense, and others doing so on the basis of their belief that a different set of acts constituted the offense. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) An example is a defendant convicted of a single count of bribery, where there was evidence of two distinct bribes. As there was no election or unanimity instruction, the conviction had to be reversed because there was no way of ruling out the possibility that some jurors based their verdict on the evidence of one bribe and the rest on the evidence of the other. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-283.) When faced with such a record, the trial court must give a unanimity instruction on its own motion. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

The jury need not agree unanimously on exactly *how* a crime was committed. (*Russo, supra*, 24 Cal.4th at p. 1135.) For example, if a defendant is charged with first degree murder, and the jury is instructed on multiple theories of first degree murder (for instance, premeditation and felony murder), no unanimity instruction is required if there was evidence of only one murder. The jurors need not agree on the theory. (*People v. Chavez* (1951) 37 Cal.2d 656, 670-671.) In some cases at least, this means that the jurors need not all accept the same account of the facts, so long as there is only one crime. For instance, a jury instructed that a murder defendant could be guilty either as the direct perpetrator or as an aider and abettor could validly return a guilty verdict even if some of

the jurors believed the defendant was the shooter and a coperpetrator assisted the defendant, while other jurors believed the roles were reversed. (*People v. Majors* (1998) 18 Cal.4th 385, 407-408.)

In this case, the prosecution presented evidence of many assaultive acts by Rios against Campbell, and also charged him with five distinct felonies against Campbell in five separate counts. Various acts were potentially capable of forming the basis of various convictions. An examination of the verdicts actually returned illustrates the potential that existed for convictions without unanimous agreement about which acts were the foundations for which convictions: The jury thought there were criminal acts that injured Campbell and others that did not injure him. In denying Rios's motion for a new trial, the trial court ruled that the verdicts were not inconsistent because they must be based on separate acts. At sentencing, similarly, when the court imposed separate (albeit concurrent and stayed) sentences for all six of the lesser included offenses the jury found under counts 3 and 4, it stated that these were supported by multiple acts.[9] So there were

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9 The court evidently assumed there were as many discrete acts or sets of acts as would be necessary to sustain the maximum number of convictions under counts 3 and 4, as it did not vacate any conviction on the ground that it was for a lesser included offense of the basis of another conviction. This assumption maximizes the unanimity problem, since it would mean that all 12 jurors had to identify the same six discrete acts or sets of acts, and then each juror had to attach each act to the same conviction as each other juror. Had the court not made this assumption, there could have been as few as three valid convictions under counts 3 and 4, and these could have been based on only one act: The two simple assaults (§ 240) and two simple batteries (§ 243, subd. (a)) would reduce first to two batteries, since assault is a lesser included offense of battery under the elements test. The two batteries would then reduce to one, absent multiple sets of acts comprising battery. Neither the section 241, subdivision (c) offense nor the section 148, subdivision (a) offense is a lesser included offense of the other, so convictions of both could be valid based on a single act or set of acts comprising the elements of both. That leaves three valid convictions. These could be based on a single act by which Rios battered and obstructed Campbell, but did not injure him (the convictions under counts 3 and 4 being those as to which the jury rejected injury findings), while having actual or imputed knowledge that Campbell was a peace officer or firefighter doing his duty as such. What is more, the conviction on count 5 could also be based on this single act, provided Rios's

nine convictions involving Campbell as the victim (six under counts 3 and 4, and one each under counts 1, 2, and 5), each potentially based on a different act or set of acts.

There are many possible permutations. For example, one juror or set of jurors might have believed all of the following: When Campbell grasped Rios's arm from behind, Rios did not actually know, and could reasonably not have known, that Campbell was a peace officer or a firefighter. When he turned, threw Campbell's hand off his shoulder, and struck a combative pose, he committed a misdemeanor assault, a lesser included offense in counts 3 and 4. (Some jurors could believe that the forceful throwing-off of Campbell's grasp was an offensive touching by Rios, and thus add the misdemeanor battery that was also a lesser included offense in counts 3 and 4.)

Then Campbell applied his arm bar hold, Rios struggled, and both went to the ground, when Campbell's metacarpal was broken by the impact. As this was happening,

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knowledge was actual knowledge; this would add another valid conviction, since none of the other offenses of conviction under counts 3 and 4 were lesser included offenses of section 69 as the section 69 offense was pleaded in this case. The record thus would be consistent with four convictions based on one act for all the verdicts returned for counts 3, 4, and 5.

Viewing the record in this simpler manner, however, would not make the unanimity problem go away, for we still could not assume the jurors viewed the entire transaction between Rios and Campbell as a single continuous course of conduct which they all agreed on as the basis of all the verdicts. This, once again, is because the remaining two convictions involving Campbell—counts 1 and 2—included injury findings and thus could not be based on the same acts as the verdicts in counts 3, 4, and 5, all of which necessitated the rejection of injury findings. So even if (contrary to another of the trial court's assumptions) counts 1 and 2 amounted only to a single valid conviction because the latter is a lesser included offense of the former and both were based on the same act, we would still have a total of five valid convictions—(injury: § 245, subd. (c); non-injury: §§ 243, subd. (a), 241, subd. (c), 148, subd. (a), and 69)—based on two separate acts. And we still would not know whether the jurors all selected the same two acts from all those in the record, and then agreed on which one was the basis of the injury conviction and which one was the basis of the four non-injury convictions. In short, we cannot eliminate the unanimity problem from this record even if we reduce the offenses and the facts to the simplest possible terms and assume the jurors each did so as well.

Rios became aware or should have become aware that he was dealing with someone associated with the fire truck that had come earlier, or with law enforcement. These acts form the basis of the convictions on counts 1 and 2 (count 2 being viewed here as a lesser included offense), with the injury enhancements.

On the ground, Rios continued struggling, trying to avoid being handcuffed, to buck Campbell off, and to bite him. These acts were the basis of the convictions on count 5 and the assault on a peace officer and resisting arrest charges that were lesser included offenses of count 4.

In another permutation, other jurors could have found that no crime at all happened prior to the arm bar hold and takedown. They could have found that the arm bar hold and takedown were excessive force, so resisting them was lawful, and that Campbell's metacarpal was not yet broken. But at this point, Rios should have realized he was being arrested by a peace officer, and at the same time, Campbell's use of excessive force subsided. Then Rios's use of force to resist became unreasonable as he struggled hard and tried to keep the handcuffs off. During this struggle on the ground, Campbell sustained his injury. This sequence was the basis of these jurors' votes to convict on counts 1 and 2.

After the injury and handcuffing, according to these jurors' findings, Rios continued fighting, bucking and trying to bite, thus committing all the lesser included offenses in counts 3 and 4, and the charged offense in count 5.

Other possible variations include finding that acts occurring before the injury on the ground formed the basis of the charged offense in count 5 and all the lesser included offenses in counts 3 and 4; then the charged offenses in counts 1 and 2 were committed while Rios and Campbell struggled on the ground; but after Rios was handcuffed, the many men involved could have stood aside while Rios wore himself out, and thus used excessive force, so Rios was guilty of no more offenses based on that portion of the incident. Or the convictions for all the lesser included offenses in counts 3 and 4 could

have been seen as being supported by the acts occurring before the injury-causing portion of the encounter, with only the charged offense in count 5 being based on acts after that portion, since it was then that Rios gained actual knowledge of Campbell's official status—and so on.

It will not do to say it does not matter which of Rios's acts were found to constitute which of his crimes, so long as all the jurors thought every element of every crime could be accounted for with some act or other and all the acts happened in a short time. Suppose a defendant is accused of stealing the wallets of three victims he encountered all together. There is evidence he picked the pockets of two unnoticed, but the third turned around and saw him and the defendant had to wrestle the wallet away from him. Two of the wallets had a little money and one had a lot. The defendant is charged with one count of petty theft, one count of grand theft, and one count of strongarm robbery. Various interpretations of the evidence are possible, under which each victim could be found to be the victim of each crime, and the jury finds the defendant guilty on all three counts. If there was no election and no unanimity instruction, all the convictions would have to be reversed. All jurors must find the defendant to have committed each crime by doing the *same* set of acts. This is *not* analogous to the murder in which half the jurors believe the defendant fired the fatal shot and the other half believe the defendant only handed the shooter the gun and urged him to kill the victim. There, on any interpretation of the evidence, there is only one murder and the jury found the defendant guilty of that one. In the present case, like the case with the three wallets or the two bribes, there are multiple acts comprising multiple potential crimes, and the jurors must unanimously settle on the acts it is finding to support each crime on which it returns a conviction.

The likelihood of prejudice arising from the failure to give a unanimity instruction was made greater by the lack of clarity and consistency in the information, jury instructions, and verdict forms, described at length in part II.B. above, on the matter of

what kind of officials Rios knew or had grounds for knowing he was dealing with. The issue is significant because peace officers and firefighters have different duties.

Suppose a juror, reviewing the jury instructions, believed Rios should have known Campbell was a firefighter, but also believed what Campbell did to Rios was an arrest, and that firefighters' duties do not include arresting people, so Rios did not have grounds for knowing Campbell was doing his duty. This juror should not have found Rios guilty of any of the offenses requiring that he knew or should have known he was assaulting, battering or resisting an official who was doing *that* official's duty.

Now suppose the same juror turns to the verdict forms. This juror would be informed that, unlike in the jury instructions, it is now an attack on a peace officer that is in question. Since peace officers' duties *do* include arresting people, the juror might feel that the misgiving he or she had while looking at the jury instructions is resolved, and he or she can vote guilty. Yet this juror would never have found that Rios should have known both that Campbell was a certain type of official, and that he was doing the duty of *that type* of official.

The problem is not that all the jurors needed to agree unanimously that Rios should have known Campbell was a peace officer doing his duty, or else that he was a firefighter doing his duty. To say that would, perhaps, be like saying the jurors all must agree unanimously on premeditation or felony murder. It may be that the right approach would have been to align the information, jury instructions and verdict forms by having each refer to a determination that Campbell and Mabry were each "a firefighter or a peace officer." The problem, instead, is that jurors could have been confused or misled in such a way that each *individually* was at risk of voting for guilty verdicts without actually finding all the elements that made up an offense.

A unanimity instruction might not have solved this problem, which fundamentally is a problem that the parties have not raised—that the instructions and verdict forms, in light of the information, were too confusing overall to lead to reliable verdicts. But the

fact that the jury was deliberating under these confusing conditions reduces the chances that the lack of a unanimity instruction was harmless.[10]

The likelihood that the jury would have settled unanimously on assigning certain acts or sets of acts to certain charges—at least to the extent of agreeing on which acts to assign to the injury convictions and which to the non-injury convictions—would have been low in any event without a unanimity instruction. It is more so given that it was unclear what exactly each juror needed to believe in order to vote for a guilty verdict on each charge.

The People argue that the "continuous course of conduct" exception applies. Under this exception, if either of two conditions exist, jury unanimity is not required despite a record containing a charged offense for which multiple different acts could form the basis, with the jurors theoretically able to make non-unanimous choices. The first of the two conditions is that "'"the acts alleged are so closely connected as to form parts of one continuing transaction or course of criminal conduct."'" (*People v. Percelle* (2005) 126 Cal.App.4th 164, 181-182.) The other is that "'"the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them."'" (*Id.* at p. 181.)

The argument for applying this exception in this case is that the entire 90 seconds to two minutes of the encounter between Rios and Campbell was an undifferentiated struggle which the jury would have had no basis for dividing into discrete acts; and that Rios's defense to this entire transaction was that he did not know and could not reasonably have known who was accosting him and only meant to defend himself against an attack by strangers.

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10 We do not rely on the confusing conditions as an independent error on the basis of which the judgment could have been reversed. We discuss it only because it is a part of the record tending to show that the failure to give the unanimity instruction was not harmless.

This argument could have been persuasive in this case under somewhat different conditions. If the information had charged just one of the assaultive offenses against Campbell—count 1, for instance—and the jury instructions had included all of the lesser included offenses supported by the evidence for that charge, it would have been hard to make a case that there was a danger of a verdict based on nonunanimous findings. The natural conclusion would be that the conviction returned represented the jurors' agreement that the whole encounter with Campbell was a single transaction constituting the crime of conviction on that one count.[11]

But instead, the numerous charges in the information invited the jury to divide up the course of conduct into discrete acts or sets of acts, and to assign different acts to different counts. We know the jurors accepted this invitation because their verdicts demonstrated that they assigned some acts to convictions involving serious bodily injury and others to convictions as to which they rejected findings of serious bodily injury. The continuous course of conduct theory does not work because the jury could not rationally find that the entire course of conduct both did and did not result in serious bodily injury to Campbell. It must have divided the acts up into at least two groups. And there is no way of knowing that all the jurors relied on the same acts for each conviction or group of convictions. Further, although Rios's counsel did not undertake to assert varying defenses to the different counts, or to challenge separately the evidence of multiple acts, the jury still found variations in the proof that allowed it to distinguish on its own

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[11] This conclusion might have been hard to resist even in a case in which Rios was charged exactly as he was here, if only the jury had found him guilty as charged. The conclusion could have been that everything that happened between Rios and Campbell was a continuous course of conduct and it satisfied all the elements of the first five counts of the information. Perhaps the correct analysis of *that* situation would be this: It was error not to give the unanimity instruction because of the possibility that the jury would choose to divide the course of conduct into discrete segments, about which it would then reach conclusions incompatible with the notion of a single course of conduct; but because that did not happen, the error was harmless.

between different acts that potentially supported the charges. We know it did this, once again, because it found one or more acts caused injury and one or more others did not.

Given the facts, the possibility of this type of result was inherent in the prosecution's charging decisions. If jurors are given an opportunity to reconcile multiple incompatible convictions arising from a brief transaction by analyzing the transaction into even briefer segments—leading to the potential isolation of more than one segment as a candidate for a factual basis for each conviction—there is always the chance that they will take it. Despite the complexity and tedium of reconciling the potential for multiple incompatible convictions, it was incumbent on the trial court to work the possibilities out in advance and give the unanimity instruction on its own motion.

We turn to the question of prejudice. The Courts of Appeal have divided on the question of whether harmless error analysis for failure to give a required unanimity instruction should proceed under the standard for state law error set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (error reversible if there is a reasonable probability the defendant would have obtained a better result absent the error) or the standard for federal constitutional error stated in *Chapman, supra,* 386 U.S. at p. 24 (error reversible unless proved harmless beyond a reasonable doubt). (See *People v. Hernandez* (2013) 217 Cal.App.4th 559, 576; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.) Courts applying *Watson* reason that because jury unanimity in criminal cases is required by California law, but not by the federal Constitution, error in omitting a unanimity instruction is state law error. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 562.) Courts applying *Chapman* hold that failing to give a unanimity instruction when required reduces the prosecution's burden of proof, and that is a denial of due process of law under the federal Constitution. (*Hernandez, supra,* 217 Cal.App.4th at pp. 576-577.)

We are of the latter school of thought. It is true that the United States Supreme Court has held that state criminal procedure rules allowing convictions by nonunanimous verdicts do not violate federal due process. (*Johnson v. Louisiana* (1972) 406 U.S. 356,

359.) For example, a conviction based on nine votes from a jury of 12 is valid. (*Id.* at p. 363.) But that hardly means there is no floor to the amount of agreement the federal Constitution requires. A rule permitting a conviction based on three votes out of 12 surely would not provide due process of law. And in those situations in which a unanimity instruction is required in California, there is the potential for less than majority agreement—indeed, depending on the facts, the potential for no agreement at all. If there are two acts that could be the basis for a given charge, a jury not properly instructed could split six to six and still vote 12 to zero to convict; if three acts, the jury could split three ways—four to four to four, for example—and still return a seemingly unanimous verdict. It is by allowing this that an erroneous omission of the unanimity instruction lowers the prosecution's burden of proof: The prosecution need not persuade even a majority of jurors to agree that a given act or set of acts by the defendant constitutes a crime.

The error here was not harmless under the *Chapman* standard. The record does not show, beyond a reasonable doubt, that if the jury had been properly instructed, it would have reached unanimous agreement on the factual basis of each conviction, and therefore would have returned verdicts just as bad for Rios as the actual verdicts. The jurors might have realized that, for a given count or counts, it could not agree on one set of facts the truth of which was accepted by all 12 jurors.

For example, on count 1, suppose six jurors believed Campbell's hand was broken when he and Rios landed on the ground together as a result of Campbell's arm bar hold and takedown. For these six, Rios caused this to happen by taking a combative stance and struggling instead of surrendering when Campbell seized him. They believed these acts satisfied the elements of assault on a firefighter or peace officer by means likely to cause great bodily injury, and elements of the enhancement allegation for personal infliction of great bodily injury. The other six jurors, however, believed that Campbell's arm bar hold and takedown constituted unreasonable force and that the fall was

Campbell's own fault. Further, in their view, Rios would not have had time before or during the arm bar hold and takedown to realize Campbell was anything other than a firefighter. These jurors found Rios had no grounds for believing arresting him was the duty of a firefighter, so Rios could not be guilty at that point of the offense charged in count 1 for that reason as well. These jurors also believed Campbell sustained his injury later, while he and Rios were wrestling on the ground together and Campbell was trying to put the handcuffs on. By that time, in these six jurors' view, Campbell had stopped using unreasonable force and Rios should have submitted, so it was Rios's continued flailing that constituted the offense in count 1 and caused the injury; and Rios by then had had a reasonable opportunity to realize Campbell was a law enforcement officer.

Without the unanimity instruction, the jury presumably would not have been concerned by or perhaps even aware of the lack of unanimity. With the instruction, they might have found their different views of the evidence were irreconcilable and thus might have hung on count 1, since there was no set of facts that comprised the offense in the opinion of all of them.

Similar stories could be told about each of the other convictions involving Campbell. Nor is there any way of isolating the prejudicial effect so that some of the convictions might be preserved while others are reversed.

Finally, it could be argued that despite the other reversals, we should affirm the conviction of the misdemeanor resisting offense presented to the jury as a lesser included offense under count 4 (§ 148, subd. (a)), because the instruction for that offense alone did include a unanimity instruction. We think not. Ordinarily, we presume jurors follow jury instructions (*People v. Yeoman* (2003) 31 Cal.4th 93, 139), but the record defeats that presumption in this case (see *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 [referring to possibility of rebutting this presumption]). As we will explain, the error of not giving a general unanimity instruction was prejudicial as to the section 148

conviction, despite the isolated and adventitious inclusion of unanimity language in the instruction for that one offense, out of many that needed it.

The instruction for this lesser included offense was the only place in the jury instructions where jury unanimity was mentioned. There was no general unanimity instruction, such as CALCRIM No. 3500, and the instructions for none of the many other similar offenses presented to the jury contained any reference to jury unanimity.

The appearance of this one reference to jury unanimity is explained by the fact that CALCRIM No. 2656, the pattern instruction for section 148, subdivision (a), stands alone among the pattern instructions for the crimes on which the jury was instructed in this case in having a built-in unanimity portion. This is a bracketed portion to be used in cases in which the prosecution presents evidence of multiple acts that might constitute an offense. This portion reads as follows:

> "[[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) <insert name, excluding title> by doing the following: <insert description of acts when multiple acts alleged>.] You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]"

In the instructions given to the jury in this case, this portion was selected and the blanks were filled in. But there is nothing in the record to support the notion that anyone actually believed, or intended to convey to the jury, the notion that for this offense alone, jury unanimity was required.

There is no reason to believe the court was aware of this irregularity in the instructions it gave. It would be unrealistic to suppose it *deliberately* told the jury to

reach unanimity on that one offense alone and none of the others. Such a deliberate decision would be inexplicable.

There is no reason to believe the prosecution reached an arbitrary decision to single out this lesser included offense in order to impose a unanimity requirement on it. In her closing argument, the prosecutor said nothing about jury unanimity. She described the elements of section 148, subdivision (a), but did not say that offense was different from all the others because it had a unanimity requirement. She did not mention the unanimity portion of that instruction at all.

There is no reason to believe the jurors thought they were meant to carry out an arbitrary and unaccountable instruction to reach unanimity on only one of the many similar offenses on which they were instructed. They did not ask the court for an explanation of the anomaly. This *could* be because they noticed the arbitrary and inconsistent character of instructions applying the unanimity requirement to one of these offenses only, and then decided to follow them without question, working to achieve unanimity on this one offense for what would have appeared to be no reason. But the more likely explanation by far is that they either did not notice the outlier or decided to disregard it.

Our discussion above of the disorderly and confusing nature of the information, jury instructions, and verdict forms is also relevant to the question of whether the erroneous omission of the general unanimity instruction was prejudicial as to the section 148 conviction despite the inclusion of unanimity language in the instruction for that specific offense. For count 4 (§ 243, subd. (c)(1)), the information referred only to battery on a *firefighter* causing injury. For the section 148 lesser included offense under count 4, the jury instructions referred only to resisting a *peace officer*. The verdict form for this lesser included offense referred only to resisting arrest, without mentioning either a firefighter or a peace officer. Confronted with this, a juror could find Rios guilty because he reasonably should have known Campbell was a firefighter doing a

firefighter's duty, a peace officer doing a peace officer's duty, a firefighter doing a peace officer's duty, or a peace officer doing a firefighter's duty. Some of these satisfy the knowledge element of the offense and others do not. Did each juror find facts that satisfied that element? We cannot answer this question with any assurance. The most likely scenario is that the pertinent distinctions were lost in the confusion.

We conclude for these reasons that the error of not giving a unanimity instruction for all the other offenses was prejudicial with respect to Rios's conviction of violating section 148, subdivision (a), as a lesser included offense under count 4, even though a unanimity instruction inadvertently *was* given for that offense alone.

All the convictions in which Campbell was the victim--those on counts 1, 2, 5, and the lesser included offenses under counts 3 and 4—are implicated in the unanimity instruction error and must be reversed.

D. Omission of jury instructions on simple assault as an alternative to the section 69 violations in counts 5 and 6

The parties agree that the jury should have been instructed on simple assault (§ 240) as a lesser included offense of the charged section 69 violations in counts 5 and 6. Rios maintains the omission was reversible error and the People contend it was not. We agree with the parties that there was error and with Rios that it was reversible.

The parties' analysis of the instructional error is incorrect, however. Because of the way the section 69 offenses were pleaded in the information, section 240 was *not* a lesser included offense of section 69. It was possible to violate section 69 without violating section 240, both under the elements test and the accusatory pleading test in this case. This is so for the same reason section 148, subdivision (a), was not a lesser included offense of section 69, as discussed in part II.B. above. Following the statute, the information accused Rios of "attempt[ing,] by means of threats or violence to deter or prevent Bakersfield Fire Dept. Campbell [or Mabry], who [was] then and there an executive officer, from performing a duty" *or* "knowingly resist[ing] by the use of force

or violence said executive officer in the performance of his/her duty." These ways of violating the statute are stated disjunctively, which means an accused could violate section 69 by committing only the first type of act: attempting by means of threat or violence to deter an officer. Such an accused would not necessarily violate section 240, which requires an attempt to commit a violent injury and a present ability to do so.[12] (Compare *Smith*, *supra*, 57 Cal.4th at pp. 240-243 [§ 148, subd. (a) was a lesser included offense of § 69 under the accusatory pleading test where the information charged the defendant with violating *both* parts of § 69 stated *conjunctively*, which he could not do without also violating § 148, subd. (a)]; *Brown, supra*, 245 Cal.App.4th at p. 153 [same analysis applied to §§ 69 and 240].) Consequently, the trial court had no duty to give the section 240 instruction on its own motion under counts 5 and 6.

An offense that is similar to another and less serious, but which is not necessarily included in the greater offense under either the elements test or the accusatory pleading test, is sometimes referred to as a lesser related offense. Section 240 was a lesser related offense of section 69 under the circumstances of this case. (Section 148, subdivision (a), a misdemeanor, also was a lesser related offense under these circumstances.)

A defendant is not entitled to have the jury receive a lesser related offense instruction over the prosecutor's objection, even if the instruction is supported by the evidence. (*People v. Birks* (1998) 19 Cal.4th 108, 112-113, 132-133.) Such an instruction can be given, however, if the parties mutually agree to it. (*Id.* at p. 136, fn. 19; *People v. Solis* (2015) 232 Cal.App.4th 1108, 1116.)

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12 The jury instructions only included the knowing-resistance-by-the-use-of-force alternative, which would, by itself, necessarily include simple assault. But under the accusatory pleading test, it is the accusatory pleading that matters, not the strategy chosen at trial. (*Brown, supra*, 245 Cal.App.4th at p. 153 [accusatory pleading test is applied to the offense as pleaded in the information, not the prosecutor's trial theory].)

Defense counsel erred by neglecting to propose such an agreement to the prosecutor.[13] On each of counts 1 through 4, the jury was provided with means to go all the way down to simple assault, but not on counts 5 and 6. The jury could well have had a special interest in doing this on counts 5 and 6 because it might have believed Rios should have known Campbell and Mabry were firefighters or peace officers doing their duty, while rejecting the claim that he had actual knowledge of this, because he was extremely intoxicated. Unlike the other offenses requiring the victims to be officials, section 69 requires proof that the defendant *actually knew* of that official status—not just that he or she should have known.

This was especially important in the case of Mabry. The jury did not have to reach any conclusions about Mabry on any other count, and it could reasonably find Rios's situation was different with respect to him. By the time Mabry arrived, Rios was in a frenzy, and he was face down on the ground. The jury could have inferred that he had even less actual comprehension of what was going on at that time than he had when

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13 By conceding that the omission of the instruction at issue was error, the People have forfeited any arguments they might have made to the effect that it was not error. The People should not be heard to claim they have been taken by surprise as to *why* we are reaching a certain conclusion when they have conceded *that* the conclusion is correct. For instance, the People have foregone their opportunity to argue that, not only did the court have no sua sponte duty to give the instruction, but defense counsel had no professional duty to seek a stipulation to its being given.

We are prohibited by statute to render a decision "based upon an *issue* which was not proposed or briefed by any party" (Gov. Code, § 68081, italics added), but we are free to decide issues raised by the parties based on *arguments* not mentioned by them. The issue here is whether the omission of a section 240 instruction under counts 5 and 6 was prejudicially erroneous. The parties briefed this *issue*. We answer the question in the affirmative based on the *argument*—not raised by the parties—that the instruction's omission arose from trial counsel's professionally unreasonable failure to pursue a stipulation.

The People's arguments on *harmlessness* have not been forfeited, however. We consider them in the context of the prejudice component of ineffective assistance of counsel.

facing Campbell at the beginning. There had already been four different people involved in subduing Rios and holding him down by the time Mabry relieved Campbell. Rios might not even have grasped that someone new had joined in. What's more, the jury could even have supposed no one reasonably *could* know much about who was on top of him under such conditions—which would have made the section 148, subdivision (a) instruction the jury received on these counts unhelpful as a lesser alternative.

Defense counsel could not have had a good tactical reason for not pursuing a stipulation on this instruction. It can sometimes be a sound defensive tactic to avoid presenting the jury with a lesser offense if possible. But that would have made no sense in this case, in which every count except the public intoxication had lesser offense instructions to which no one objected, including counts 5 and 6. There was no defense strategy in this case of trying to tip the jurors into an acquittal by presenting them a greater offense as the only alternative.

There is no reason to suppose the prosecutor would have refused to agree to a section 240 instruction on counts 5 and 6. She had no objection to the section 240 lesser included offense instructions on the other counts. And she was not disturbed by the fact that section 148, subdivision (a), on which the court did instruct under counts 5 and 6, was not actually a lesser included offense of section 69, but only a lesser related offense. Such instructions can have advantages for both sides.

As we have already intimated, someone could argue that if the jury wanted to acquit Rios of the section 69 violations in counts 5 and 6 because of doubts about his actual knowledge, it could still have found him guilty of violations of section 148, subdivision (a), which were set forth in counts 7 and 9 as if they were lesser included offenses of counts 5 and 6. The elements of section 148, subdivision (a) can be satisfied by imputed "should-have-known" knowledge, so the jury could have resorted to that offense if they found it was not proved that Rios actually knew Campbell and Mabry were officials doing their official duty. Because the jury did *not* take that route, the

argument would go, we can be confident that its verdicts on counts 5 and 6 were not influenced by the lack of a lesser alternative.

But an error by the trial court rendered meaningless any apparent reaction by the jury to the section 148, subdivision (a) instruction. The court gave the jury a misleading, off-script instruction on what to do with the section 148, subdivision (a) lesser included offenses in counts 7 and 9.

To explain how to deliberate about lesser included offenses in general, the court used CALCRIM No. 3519, which included the following correct statement: "It's up to you to decide the order in which you wish to consider each crime and lesser crime and the relevant evidence, but I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the greater crime." Moments before the court read this sentence, however, it stated as follows:

> "Penal Code Section 148(a) as charged in Count 7 , is a lesser crime to Penal Code Section 69 as charged in Count 5.
>
> "Penal Code Section 148(a) as charged in Count 9 is a lesser crime to Penal Code Section 69 as charged in Count 6.
>
> "Basically what that means is if you want to address Count 7, you need to find the defendant not guilty of Count 5.
>
> "If you find him guilty of Count 5, then you don't need to address Count 7.
>
> "So you don't get to the lesser unless you found not guilty as to the greater."

The latter half of this set of statements, beginning with "[b]asically what that means," is not part of the pattern instruction, and it is erroneous. It is true, as just noted, that the court is not to *accept a verdict* of guilty on a lesser included offense unless the jury first, or at the same time, *returns a verdict* of not guilty on the greater offense. But that is not what the court said when specifically addressing the lesser included offenses in counts 7 and 9. The court stated that the jury should not *address* the lesser offense unless

it finds the defendant not guilty of the greater; if it *wants* to address the lesser offense, then it *needs* to find the defendant not guilty of the greater; and it should *not get to* the lesser unless it has *found* the defendant not guilty of the greater. The only reasonable interpretation of these words is that the jury must first *decide* whether the defendant is guilty or not guilty of the greater offense, and if he is found not guilty, only then should the jury *consider* the lesser offense. This misstated the law. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328-331, 334-335 [proper to forbid jury to return any verdict on lesser offense without having found defendant not guilty of greater; improper to direct jury not to deliberate on or consider lesser unless it first reaches agreement to acquit on the greater].)

This mistake greatly diminished any light the jury's decision to convict on section 69 instead of section 148, subdivision (a), might have shed on the matter of the harm done by the omission of the section 240 instruction. If the jury followed the court's extemporaneous instruction, then it never thought about section 148, subdivision (a), on counts 5 and 6. We cannot say the verdicts indicate the jury inclined toward the charged offense, not a lesser one.

The People contend that the error was harmless because, as they put it in their brief, the jury found Rios guilty on count 1, which "required the jury to find that Campbell was lawfully performing his duties as a peace officer and appellant knew or should have known that Campbell was a peace officer who was performing his duties. Thus, the jury necessarily rejected the defense theory that Campbell was not acting within the scope of his lawful duty."

This argument is mistaken for three reasons. First, in focusing on the idea that the jury's verdict on count 1 shows it believed Campbell was performing his lawful duty, the People miss the point. The prejudice arises in connection not with the issue of what Campbell was *actually* doing—about which there is not much dispute—but the issue of what Rios knew or should have known about it.

Next, the People's argument overlooks the point that on the knowledge element of count 1, the jury only needed to find that Rios actually knew *or* should have known that Campbell was a peace officer or firefighter doing his official duty. It could have found Rios guilty by finding only that he should have known. For count 5, by contrast, Rios was guilty only if he *actually* knew Campbell was an executive officer doing his official duty. So, without contradicting its verdict on count 1, the jury could have found Rios not guilty of a section 69 violation by making a finding that he did not actually have the required knowledge (because of voluntary intoxication or other reasons). Then it could have fallen back on simple assault, had it been given a suitable instruction. From the defense perspective, the point of lesser offense instructions, whether included or related, is to avoid the risk that the jury will convict on a greater charge even though some aspects of the evidence are weak, because it sees that as better than returning an outright acquittal when other aspects of the evidence are strong. (See *Breverman*, *supra*, 19 Cal.4th at p. 158 [this is one reason why lesser included offense instructions are required].)

There is a reasonable probability that the jury would have found a lack of actual knowledge if it had had the option of opting for simple assault on these counts. It was instructed that Rios's voluntary intoxication could be considered on this count for its possible relevance to his actual knowledge. The fire department witnesses described Rios's state of intoxication as extreme, so a finding that he lacked actual knowledge of who was tackling him would not be improbable. The People are mistaken in their harmlessness argument on counts 5 and 6.

Everything we have said on this issue applies to Mabry and count 6, as well as Campbell and count 5. This brings us to the third defect in the People's argument: The verdict on count 1 did not imply anything at all about Mabry or what Rios knew or should have known about him. The People thus have offered no reason at all why the omission of the section 240 instruction would be harmless as to count 6.

We conclude it was not professionally reasonable for Rios's trial counsel not to ask the prosecutor for a stipulation for a section 240 instruction as a lesser offense on counts 5 and 6. There is a reasonable probability that, but for this oversight, the stipulation would have been made, the instruction would have been given, and Rios would have obtained a better result on counts 5 and 6. Therefore, the convictions on those counts must be reversed due to ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [reversible denial of right to effective counsel established if counsel made a professionally unreasonable error and there is a reasonable probability that defendant would have obtained better result absent the error]; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.)

E. Court's refusal to give CALCRIM No. 3470 on self-defense

An official whose official duty and authority include the use of force to arrest people—i.e., a peace officer—but who uses excessive force, is not acting within the scope of his or her official duty or authority. Consequently, excessive force can be a defense to a charge of assault, battery, or resisting where the victim is such an official: The defendant is entitled to use force reasonably necessary to defend himself against the official's excessive force. In this case, the trial court used CALCRIM No. 2670 to inform the jury on these points, as set forth above.

Rios's counsel requested that the court also give the ordinary self-defense instruction, presumably[14] CALCRIM No. 3470, which, for purposes of this case, would have included at least the following portions, had it been appropriate to give at all:

> "Self-defense is a defense to all the offenses charged in counts 1 through 7 and count 9. The defendant is not guilty of those crimes if he used force

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14 The reporter's transcript records the trial court's denial of defense counsel's request, but the clerk's transcript does not include those jury instructions that were requested but rejected by the court. We presume the CALCRIM instruction was the one requested because all the pattern instructions used in the case were CALCRIM instructions.

against the other person in lawful self-defense. The defendant acted in lawful self-defense if:

"1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or being touched unlawfully;

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily harm to himself or an imminent danger that he would be touched unlawfully. Defendant's belief must have been reasonable and he must have acted on that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of the above crimes."

The trial court refused to give this instruction, stating that it was not warranted by the evidence.

The significant difference between the two instructions, for our purposes here, is that the ordinary self-defense instruction does not require the defendant's action to be in response to an officer's excessive force or other unlawful behavior. Rios maintains that, regardless of whether excessive force was ever used against him or the arrest was otherwise unlawful, there was evidence sufficient to support a defense of self-defense

because the jury could reasonably find he never knew and never was in a position to know he was being seized or arrested by people whose duty it was to do those things.

Our conclusion is that either the trial court was correct in ruling that the evidence did not support the giving of the instruction, or else its omission was harmless error. As we will explain, the key here is that Rios actually was committing a misdemeanor (public intoxication) in the presence of Campbell and Mabry, and consequently, assuming there was no excessive force—about which the jury was properly instructed—the arrest was lawful. Under these circumstances, Rios had no right to defend himself by force against even a citizen's arrest. This is so even if he believed he was being attacked while minding his own business. While actually committing a public offense, he could not *reasonably* believe in his right to be left alone, and anyone before whom he was committing it could lawfully arrest him, regardless of whether or not the arresting person was or reasonably appeared to be a peace officer.

By statute, an arrest can be made by a peace officer or a "private person." (§ 834.) An arrest by a private person—i.e., anyone not vested with the authority of a peace officer—is commonly called a citizen's arrest, although the private person's citizenship has no bearing on the validity of an arrest. A private person is authorized to make an arrest in three situations: (1) when the arrestee has in fact committed a public offense (including a misdemeanor or a felony, see § 15) in the presence of the arresting person; (2) when the arrestee has in fact committed a felony, even if not in the arresting person's presence; and (3) when someone has in fact committed a felony, and the arresting person has reasonable cause to believe it was the arrestee who committed it. (§ 837.) Noteworthy is the fact that in the first two situations, the arrest is authorized only if the arrestee really is guilty, and even in the third situation someone has to be guilty. If there is any doubt, the arresting person takes his or her chances of being put in the wrong by making the arrest.

A peace officer's authority to make arrests is broader. A peace officer can make a lawful arrest pursuant to an arrest warrant, or without a warrant in the following three situations: (1) the officer has probable cause to believe the arrestee has committed a public offense (including a misdemeanor or felony) in the officer's presence; (2) the arrestee has in fact committed a felony, even if not in the officer's presence; and (3) the officer has probable cause to believe the arrestee has committed a felony, even if, in reality, a felony has not been committed. (§ 836, subd. (a).) A peace officer thus has substantial authority to make arrests of people who turn out to be innocent.

A statute places a duty on everyone who knows or reasonably should know he or she is being arrested by a peace officer not to use "force or any weapon" to resist the arrest, regardless of whether the arrest is lawful or not. (§ 834a.) If the arrest is not lawful, however, the arrestee's liability for resisting with reasonable force is limited to offenses such as misdemeanor assault or battery, which do not require the officer to have been performing his or her lawful duty.[15] (*People v. White* (1980) 101 Cal.App.3d 161, 164, 166-167.) If the arrest is unlawful because of the peace officer's use of excessive force, the arrestee has no liability for any offense for resisting with reasonable force. (*Id.* at p. 168.)

Although no statute expressly says so, the duty not to resist extends to a citizen's arrest, so long as the arrest is lawful. (*People v. Fosselman* (1983) 33 Cal.3d 572, 579; *People v. Garcia* (1969) 274 Cal.App.2d 100, 105; *People v. Score* (1941) 48 Cal.App.2d 495, 499 ["No person may add to his crimes when caught in the act of committing them by resisting the citizen who voluntarily acts in behalf of the state. If he does so, he will

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15 It is also true that if the arrest is lawful, but the arrestee reasonably believes the arresting person is not a peace officer (a possible finding for the jury in this case), the arrestee's resistance can result in liability only for offenses of which the defendant's actual or reasonably imputed knowledge that the arresting person is a peace officer is not an element. But this was made clear by the jury instructions defining each offense in this case.

suffer for the ordinary consequences of his act."].) As explained above, a citizen's arrest is lawful if a crime actually has been committed, and, in the case of a misdemeanor, has been committed by the arrestee, in the arresting person's presence. There is no duty not to resist an unlawful citizen's arrest. (*Sparks v. City of Compton* (1976) 64 Cal.App.3d 592, 599.)

At trial, Rios's strategy did not include a claim that he was not publicly intoxicated. The evidence of his intoxication was strong and uncontradicted. The jury found him guilty of that offense and that conviction is not challenged on appeal. Further, the evidence on which this conviction was based was, at the same time, evidence that Rios committed the offense in the presence of Campbell and Mabry. The arrest, therefore, was a lawful one, regardless of whether or not Campbell and Mabry were peace officers; and Rios had no right to defend himself against it, regardless of whether or not he knew or should have known they were peace officers.

Consequently, one of the following is true: (1) The court acted within its discretion in ruling that the evidence did not warrant giving the self-defense instruction because the jury could not reasonably find Rios did not commit a misdemeanor in the presence of Campbell and Mabry; consequently, the arrest was lawful, and even if Rios reasonably did not know Campbell and Mabry were peace officers, he had no right to defend himself from any but excessive force used in arresting him. (2) It was error not to give the instruction because the jury could reasonably find it unproved that Rios was committing a misdemeanor in Campbell and Mabry's presence, for example, by rejecting the testimony about Rios's behavior as self-serving and unsupported by lab results, and viewing the behavior as susceptible of other equally plausible explanations. If Rios was not committing a misdemeanor in their presence, and reasonably did not know they were peace officers, then he had no duty not to resist them. There is a duty not to resist a lawful citizen's arrest; and there is a duty not to resist an arrest by a peace officer, lawful or unlawful, if the arrestee knows or reasonably should know it is an arrest by a peace

officer; but there is no duty to submit to an arrest that would be unlawful if it were a citizen's arrest and the arrestee reasonably believes the arresting person is not a peace officer (even if the arresting person really is a peace officer and the arrest is a lawful one for a peace officer to make). Resistance under those circumstances could not amount to resisting arrest or any other offense requiring the defendant's actual or reasonably imputed knowledge; and it also would not be assault or battery, because the defendant would be acting on a reasonable belief in the need for self-defense. So the jury could reasonably have found that Rios had a right to defend himself even in the absence of excessive force. But the error was harmless. The jury's unchallenged verdict on count 8 shows they found it was proved Rios was committing a misdemeanor in Campbell and Mabry's presence, so the arrest was lawful and Rios would have been obliged to submit to it even if he reasonably believed they were not peace officers.

Finally, Rios maintains the instruction should have been given just because he was relying on self-defense at trial, regardless of the state of the evidence. He relies on the statement by our Supreme Court that an instruction on a particular defense, such as self-defense, should be given even without a request "if it appears that the defendant is relying on such a defense, *or* if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716 (italics added), overruled on other grounds by *Breverman, supra*, 19 Cal.4th at pp. 172-173.) He also cites *People v. May* (1989) 213 Cal.App.3d 118, 124-125, which emphasized that the test is disjunctive as stated in *Sedeno*, so the court must give the instruction if the defendant appears to be relying on the defense, even if the evidence is not sufficient to support it. The Supreme Court has repeated this disjunctive formulation subsequently without explaining it. (See, e.g., *Breverman, supra*, 19 Cal.4th at p. 157; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824.)

We do not know why this formulation has been so often repeated, but we think it cannot mean what it literally says. If a trial court must give a self-defense instruction (or other instruction on a defense) on its own motion whenever it "appears" the defendant is "relying" on that defense, even if it lacks evidentiary support, and even when it is inconsistent with the defendant's theory of the case, then it must be true a fortiori that the court should give the instruction whenever, as in this case, the defense requests it—since the defense surely is relying on it then—regardless of the state of the evidence. Yet this is not the law. The rule on a requested self-defense instruction is the same as the rule on requested instructions generally: The court must give the instruction if the record contains evidence on the basis of which the jury could reasonably find the instruction applicable (could find there is a reasonable doubt of guilt in light of the instruction, in the case of defenses), and need not give it otherwise. (See, e.g. *People v. Adrian* (1982) 135 Cal.App.3d 335, 336 [self-defense instruction "must be given upon request whenever … the evidence warrants submitting the issue to the jury"]; *People v. Elize* (1999) 71 Cal.App.4th 605, 610-617 [requested self-defense instruction required because evidence could support self-defense finding by jury, despite defendant's testimony that he shot victim by accident rather than in self-defense].)

For these reasons, the trial court's refusal to give the requested self-defense instruction was not reversible error.

F. Court's refusal to give voluntary intoxication instruction on count 1

The trial court refused a defense request to give an instruction on count 1 that Rios's voluntary intoxication could be relevant to the knowledge element of that offense. Instead, the court instructed that voluntary intoxication was relevant only to counts 5 and 6. Rios contends this was error. The People maintain that the ruling was correct because count 1 required a finding not that Rios actually knew Campbell was a certain type of official doing his duty, but that he actually knew *or* should have known. Voluntary intoxication would be relevant only to actual knowledge, as an intoxicated person who

fails because of intoxication to know what he or she reasonably should know will still be held responsible. Since Rios would still be held responsible for purposes of count 1 for what he ought to have known, even if he was too intoxicated to know it, the issue of voluntary intoxication is irrelevant to that charge.

Among other things, Rios argues in effect that the voluntary intoxication instruction should have been given because it is relevant to the actual knowledge alternative in the elements of the offense, even if not to the imputed "reasonable person" knowledge. If the jury were to decide first that a reasonable person would *not* necessarily have known Campbell was a peace officer or firefighter doing his duty, it would then have to turn to the question of whether, in spite of this, Rios had somehow come into that *actual* knowledge, and on this point his intoxication could be significant.

As we are reversing count 1 for another reason, we need not resolve this dispute.

III. Pitchess motion

The parties agree that we should review the record of the in camera proceedings that were held pursuant to Rios's motion under *Pitchess, supra*, 11 Cal.3d 531 and determine whether any discoverable material was withheld.

In deciding a *Pitchess* motion, a court must first determine whether the motion shows good cause for production of confidential personnel records. If it does, the court must obtain potentially relevant personnel records from their custodian and review them for relevance at a hearing in camera. The court is then to order disclosure to the moving party of information relevant to the pending litigation, if any. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) We review the trial court's ruling for abuse of discretion. (*Id.* at p. 1228.)

Before trial, the defense moved for discovery pursuant to *Pitchess, supra*, 11 Cal.3d 531. The motion requested that the Bakersfield Fire Department be ordered to produce personnel records on Campbell and Mabry containing information relevant to honesty and credibility, prior wrongful acts involving moral turpitude, excessive use of

force, false arrests, conduct unbecoming an officer and neglect of duty. Campbell had had a previous career as a police officer in Bakersfield, but Rios's motion did not request personnel records from the police department. The court issued the order, received the records and held an in camera proceeding. The court found no discoverable evidence and ordered no disclosures.

We have reviewed the records on Campbell and Mabry that were produced by the city attorney and examined by the trial court in camera. We have found no documents relating to excessive force, dishonesty, or any other issue relevant to the case. The trial court did not abuse its discretion.

IV. Remaining issues

The parties' briefs address several additional issues.

Lesser included offenses

Rios argues that several of the convictions should be vacated because they are for lesser offenses included in others of which the jury also found him guilty. The People agree as to some of these.

The parties' views on this point lead to problems about which convictions are based on which acts, particularly with respect to lesser offenses based on non-injury findings said to be included in greater offenses based on injury findings (e.g., simple assault found under count 4 as one of the non-injury alternatives to the charged offense and charged enhancement, viewed as a lesser offense included in the conviction on count 1). The record does not appear compatible with simply vacating the conviction for every offense the elements of which are a subset of the elements of another offense for which there was a conviction.

It is unnecessary for us to settle this question, since we are reversing all the convictions in question for the reasons given above.

Cumulative error

Rios asserts that the errors to which he points are erroneous cumulatively even if not separately. It is unnecessary to address this point, since we are reversing all the convictions except the one on count 8, which is not challenged in this appeal.

Sentencing issues

Rios raises sentencing issues under Senate Bill No. 1393 (Stats. 2018, ch. 1013) and Proposition 47. These issues are moot, but we address them in case they arise again on remand.

Rios argues that he should be resentenced pursuant to sections 667 and 1385 as amended by the legislation known as Senate Bill No. 1393 (Stats. 2018, ch. 1013), to enable the trial court to exercise its discretion, newly established by that legislation, to consider striking the sentence enhancement imposed under section 667, subdivision (a)(1). In Rios's view, this legislation must be applied in his case retroactively under the rule stated in *In re Estrada* (1965) 63 Cal.2d 740 regarding new statutes that reduce punishment. The People agree. We do as well, for the reasons stated in *People v. Marquez* (2019) 31 Cal.App.5th 402, 414. If this enhancement is applicable after any retrial, the trial court must exercise its discretion on the question of striking it.

Rios next argues that under provisions of Proposition 47 codified in section 1170.18, the imposition of one of the one-year enhancements under section 667.5, subdivision (b), was erroneous. This enhancement was the one based on case No. BF139744A, with a conviction date of February 8, 2012, for possession of a controlled substance (former Health & Saf. Code, § 11377, subd. (a)). The probation report showed that this offense was reduced to a misdemeanor by order of the superior court on April 22, 2016, under section 1170.18.

At the sentencing hearing, defense counsel argued that because this offense had been reduced to a misdemeanor, it could not serve as the basis of an enhancement under section 667.5, subdivision (b), which must be based on a prior felony for which the

defendant served a prison term. The trial court rejected this argument. It stated that it would have struck the enhancement for this prior offense if the prior offense had been deemed a misdemeanor under section 17, subdivision (b), which states that an offense so deemed is "a misdemeanor for all purposes." The trial court said, "Certainly if it was 17(b)'d and had been reduced to a misdemeanor then it is a misdemeanor for all purposes. But that's not the situation." The court also said "the [L]egislature" "didn't make it clear and they should have but they didn't" in the new law. In their appellate brief, the People make no argument on this issue.[16]

The court was mistaken. Using the same words as section 17, subdivision (b), the voters who enacted Proposition 47 stated that a felony reduced to a misdemeanor under the terms of the new law would thenceforth be "a misdemeanor for all purposes." (§ 1170.18, subd. (k).) This means that a trial court imposing sentence for a current offense must treat a prior offense that has already been reduced to a misdemeanor under this provision *as* a misdemeanor for the purpose of deciding whether it can serve as the basis for a sentence enhancement. At the time of Rios's sentencing on September 8, 2016, authority to this effect had existed for several months (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 743-748), but contrary authority had done so as well (*People v. Acosta* (2016) 247 Cal.App.4th 1072, 1077-1079, overruled by *People v. Buycks* (2018) 5 Cal.5th 857, 889, fn. 13). Our Supreme Court settled the matter in *Buycks, supra,* at pages 889 and 896. Rios's 2012 conviction in case No. BF139744A for possession of a controlled substance is a misdemeanor for all purposes and cannot be used as the basis of a sentence enhancement under section 667, subdivision (b).

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16 Rios and the People agree that existence of the prior conviction and prison term in case No. BF139744A was not proved at the bifurcated court trial on priors because the People did not supply the documents relevant to that case in the section 969b packet. This, of course, would be another reason why the enhancement based on this prior would have to be reversed.

This conclusion gives rise to a related question. The earliest of the prior three felonies alleged in the information was the violation of former section 12021, subdivision (c)(1), being a misdemeanant in possession of a firearm, in case No. BF120948A, with a conviction date of February 21, 2008. Under section 667.5, subdivision (b), a prior prison term "washes out" and cannot support the one-year enhancement if, after being released, the defendant goes five years without another felony conviction or prison term. If a felony conviction has been redesignated a misdemeanor pursuant to section 1170.18, it would not prevent the washout of a previous prison term. The previous prison term thus would wash out provided the defendant's next felony conviction, if any, did not occur within five years of the completion of that previous prison term. (*People v. Warren* (2018) 24 Cal.App.5th 899, 914-917; *People v. Kelly* (2018) 28 Cal.App.5th 886, 900-901.) Consequently, the 2008 prior should wash out if Rios was released from prison five years or more before May 28, 2015, the date of conviction of the third prior felony, the section 422 violation. From the relevant sources of information in the record—the section 969b packet and the probation report—it is unclear when Rios was released. The probation report appears to indicate he was paroled for the last time on October 16, 2011, after multiple violations of probation and parole. If that is the release date, then that 2008 prior did not wash out, since the date is less than five years before May 28, 2015. The matter will need to be looked into before the 2008 conviction can be used to support a section 667.5, subdivision (b) enhancement on remand.

V. Penal Code sections 1001.35 and 1001.36

In 2018, the Legislature created chapter 2.8A of title 6 of part 2 of the Penal Code, consisting of Penal Code sections 1001.35 and 1001.36, effective June 27, 2018. (Stats. 2018, ch. 34, § 24.) A subsequent amendment narrowing the scope of the law became effective on January 1, 2019. (Stats. 2018, ch. 1005, § 1.) The new law empowers trial courts, on their own motion, to hold proceedings to determine whether a criminal defendant is mentally ill, and, if the necessary facts are found, to order deferral of

prosecution while a mentally ill defendant is diverted to a mental health treatment program, with the charges potentially being dismissed later.

The purpose of the new law is "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).) Diversion is potentially available to a mentally ill defendant charged with any misdemeanor or felony, except for rape, murder, and several other enumerated offenses, none of which are at issue in this case. (§ 1001.36, subd. (b)(2).)

This case has features that might be consistent with consideration to diversion under the new law, if charges are again pursued on remand.

DISPOSITION

The judgment is reversed except for the conviction on count 8. The case is remanded to the trial court for further proceedings consistent with this opinion.

_____
SMITH, J.

I CONCUR:

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SNAUFFER, J.

Franson, Acting P.J., concurring and dissenting.

I concur with the majority that a unanimity instruction should have been given as to counts 1 through 5 and that the jury should have been instructed on simple assault as a lesser related offense to counts 5 and 6. Reversal of the judgment as to counts 1, 2, 3, 5 and 6 is therefore appropriate. Beyond the analysis of these issues on pages 32 to 37, 41–43 and 46–49, the majority's long and "tedious" discussion of the insignificant and unimportant inconsistencies in the wording of the information, jury instructions and verdict forms (which were not raised by the parties) is misguided, unnecessary and unpersuasive. In the absence of any evidence of confusion on the part of the jury, "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) There is no reason to abandon this presumption in this case where the relevant instructional language is clear and easy to understand.

The presumption that jurors follow the law is rebuttable, but there must be evidence to support this. Here, there is no evidence in the record that anyone, specifically the jurors, were confused by the charges, instructions or the verdict forms. As an example, the majority attempts to create confusion by emphasizing insignificant differences in the job descriptions of Campbell as a fireman in the information, and a peace officer in the instructions and verdict forms. It is uncontroverted that both Campbell and Mabry were arson investigators. As instructed, an arson investigator is a peace officer; a peace officer is an executive officer; and a firefighter is anyone who is a member of a fire department. Substantial evidence established that Campbell and Mabry were peace officers, firefighters and executive officers, doing their official duties as such.

Attempting to create confusion by comparing the information to the jury instructions and verdict forms is a novel argument, lacking any legal basis. The jury is not required to understand or follow the information. Penal Code section 1093, subdivision (a) simply requires the clerk to read the information to the jury at the

beginning of each trial, unless a defendant waives the reading. In contrast, jurors are required to generally understand and follow their instructions. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) There is no evidence the jurors failed to understand the instructions or verdict forms.

I dissent from the majority's conclusion that the guilty verdict for violation of Penal Code section 148, subdivision (a)(1), as a lesser included offense to count 4, should be reversed in spite of a unanimity instruction given in the specific Penal Code section 148, subdivision (a) jury instruction, as required, and outlined in CALCRIM No. 2656. Again, this issue was not raised by the parties. The majority argues that the general unanimity instruction (CALCRIM No. 3500) should have been given, rather than the unanimity provision contained in CALCRIM No. 2656, although the language is nearly identical. They also claim the specific and appropriate unanimity instruction was accidentally included by the parties, based only on speculation, and insultingly claim that the court was unaware of the import of this unanimity instruction. They acknowledge the bedrock principle that jurors are presumed to understand and follow jury instructions, yet claim the record defeats this presumption. Again, there is no credible support in the record to support this strained conclusion.

I would affirm the jury's guilty verdict on this lesser included offense to count 4.

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FRANSON, Acting P.J.